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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

FREDERICK A. HURLEY and CHRISTINE A. HURLEY,
Petitioner,

vs.

MOTOR COACH INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether be United States Court Of Appeals for the Seventh Circuit erred by holding, in direct conflict with this Court's opinions in *Freightliner Corp. vs. Myrick*, 514 or US. 280 (1995) and *Geier vs. American Honda Motor Co.*, 529 U.S. 1913, (2000) that petitioners' claims were preempted by the FMVSSA because the petitioners' claim with regard to defective design related to the issue of driver's compartment "crashworthiness" which is an unregulated area under the *Federal Motor Vehicle Safety Standards Act* and therefore cannot be preempted solely by regulations involving passenger restraint, i.e. seat belts, air bags and etc. on the basis of the manufacturer's made a choice of an approved passive restraint system without any showing on the part of the manufacturer that it complied with the performance standards of the Act itself. Petitioners' claim is not that the vehicle in question needs an airbag but that the entire driver's compartment needs to be redesigned because as configured by the manufacturer it cannot meet the performance requirements of the Act. Petitioners' total redesign of the compartment requires greater passive restraint than a two point seat belt in order to meet the performance requirements. The two point seat belt is one of the manufacturer's design options assuming that it meets the performance standards of the Act. In Petitioners opinion a total redesign based upon an alleged fundamental failure to perform within the published performance standards is a case of first impression before this Court.

2. Whether be United States Court Of Appeals for the Seventh Circuit erred by holding, in direct conflict with three other United States Circuit Courts of Appeals and recently one intermediate state Court of Appeals both

before and since this Court's ruling in *Geier*, supra, that a manufacturer's choice of passive restraint (safety) equipment is paramount over any issue with respect to the performance of the equipment in terms of the Safety Standard's published performance requirements. In other words a manufacturer is not required to prove that its choice was appropriate and that prior to its choice that it tested the equipment as required and as set forth by the act and, most importantly, that the test results revealed that the choice of passive restraint equipment, in fact, met the performance standards of the Act. According to the Seventh Court of Appeals a manufacturer must only prove that it chose a design specified as an alternative equipment design within the act to avoid any further liability. Furthermore, the ruling eliminates any simple claim that the crash took place within the published performance guidelines and the equipment either malfunctioned or simply did not work. This was clearly not the intent of Congress.

3. Whether the United States Court Of Appeals for the Seventh Circuit erred by holding, in direct conflict with the published legal opinions of the Government of the United States, Department Of Transportation, National Highway Traffic Safety Administration and the Department Of Justice, that a manufacturer's choice of equipment is the lynch pin for resolution of issues relating to compliance and therefore preemption. It is the government's position that performance standards set the actual criteria and the real issue is performance vs. failure to perform. Failure to perform is of paramount concern to the government, not design criteria in the abstract.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioners Frederick A. Hurley and Christine A. Hurley (at his appellants) and respondent Motor Coach Industries, Inc. (as appellees).

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1- 13) is reported at 222 F. 3d 377. The order of the District Court granting defendant's motion for summary judgment (App. 14-26) is not reported.

JURISDICTION

The Court of Appeals entered judgment on July 25, 2000 and denied Rehearing and Rehearing en Banc on August 31st, 2000. This Court has jurisdiction under 28 U.S.C. section 1254.

STATUTORY PROVISIONS INVOLVED

Motor Vehicle Safety Standards Act originally codified at 49 U.S.C. 1381 and re-codified in 1994 at 49 U.S.C. section 30101 et. seq. The supremacy cause and the savings cause may be found at 49 U.S.C. 30101(a) and 49 U.S.C. 30101(e) respectively.

> **49 U.S.C. section 30103. Relationship to other laws** .
>
> (b) **Preemption.** (1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in a fact the standard applicable to the same aspect of performance of a motor vehicle or motor vehicle eight meant only if the standard is identical to the standard prescribed under this chapter. However, the United States government, a State, or a political subdivision of a State may prescribe the standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirements than that required by the otherwise applicable standard under this chapter

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

* * * *

(e) **Common Law Liability** . Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

* * * *

Some of the applicable preemption cases, including the decisions by the two courts below, discussed the provisions as codified after 1994. However, the Geier opinion, supra, discusses the provisions as codified prior to the 1994 recodification. This petition, therefore, uses the citations employed in both the pre and post 1994 recodification.

STATEMENT OF THE CASE

Petitioners' cause of action in the underlying lawsuit was brought pursuant to the Illinois "crash-worthiness" and "enhanced injury" doctrines as set forth in *Oakes v. General Motors Corp.*, 262 Ill. App. 3rd 372, 633 N.E.2d 1277 (1st Dist. 1993). In their complaint and in the matters briefed below Petitioners are contending that the vehicle is under designed (a manufacturing defect) wherein the driver's compartment of the bus is caused to collapse in and upon the driver in relatively low speed collisions involving impacts with high profile objects such as the rear end or sides of tractor/trailers. There are no standards in Title 49 C.F.R. Chapter 571 that create a standard of performance relating to the configuration and structure of the driver's compartment and its ability to remain intact and not to be structurally

compromised in a low speed collision. However, clearly those standards that do exist presume structural integrity of the drivers' compartment or they wouldn't make any sense in any regard. Sections 571.208 S 4.4.3 and 4.4.3.1 relied upon by Respondent MCI, and erroneously by the Courts below, relate solely to "crashworthiness" in conjunction with driver and occupant passive restraint systems. The purpose of the standard is to keep the driver and passengers (occupants) of the vehicles inside the vehicle in the event of a frontal or side impacts of 30 miles per hour. *49 C.F.R. 571*, 208 (6.1)

Perhaps, more importantly, if under the state common law a manufacturer is required to redesign the front of the bus so as to deal with the structural under design of passenger or driver compartment and that the alternate design causes increased forces on the driver to such an extent that the performance requirements of Sections 5 & 6 of the standards themselves can no longer be met with any of the choices of driver restraint system, i.e., two point seat belt, three point seat belt, airbags or a combination of the same, necessitating the use of two additional restraints, does the cause of action fall to the doctrine of implied preemption as set forth in this Court's recent decision of *Geier*, supra, particularly in light of the failure of the original design to perform as required by the performance sections of the standards. In the redesign proffered by Petitioners the forces on the computer generated anthropomorphic dummy are within the standards set forth in 40 C.F.R. 571.208 Sections 6 and 7 and they meet the criteria of 4.4.3 & 4.4.3.1 as well. There is absolutely no evidence that the bus as designed meets those critical performance standards. Plaintiffs contend the additional restraints do not in any way cause the redesign to be preempted under the

Safety Acts preemption clause. The redesign is in complete conformity with the design criteria of the act. Does the option or choice of design without any evidence of proof of the performance, infallibly defeat the real purpose of the regulatory scheme, i.e. "safety performance"?

UNDISPUTED FACTS

For the sake of clarity and simplicity, the parties will be referred to as they were below in this trial court. Plaintiff Frederick A. Hurley was the driver of a Greyhound Lines inter-city bus manufactured by Defendant Motor Coach Industries. The vehicle in question was manufactured in 1992. The accident that gives rise to the cause of action took place on February 21, 1993 in Madison County, Illinois wherein the bus Plaintiff Fred Hurley was operating collided with the right rear of a consolidated Freightways tandem tractor/trailer that had jack-knifed and was blocking both lanes of northbound and eastbound Interstate 55-70 at or near mile marker 17. The collision took place on the outward side of a blind turn on the highway where the roadway passes underneath old Highway U.S. 40. Plaintiffs' engineering evidence is that there are only fourteen inches of space between the driver's feet and the inside front partition wall of the bus. All the engineers involved agree that the speed of the bus at impact was 33 miles per hour and that the front bumper of the bus under-rode the bottom iron structure of the floor of the rear of the tractor/trailer. The engineers further agree that the actual Delta-V (for change in velocity of the bus at impact) was only 23.5 miles per hour. The 23.5 mile an hour Delta-V is the equivalent of a crash barrier speed of 23.5 miles per hour. The performance standards of the Act require the driver to be uninjured in a 30 mph barrier collision.

Plaintiffs alleged that the entire front end of the bus and, in particular, the driver's compartment was "under designed" and therefore not "crash worthy" which defect caused or "enhanced" plaintiff's severe injuries to his lower extremities. As designed by Defendant, the front of the bus above the floorboard of the driver's compartment consists of minimal structure and provided very little or no protection to drivers of the bus in front end impacts with high profile objects such as the rear of over the road trailers when the front bumper of the bus under rides the iron or steel floorboard structure of the trailer resulting in an impact which takes place on the driver's compartment above the floorboard and not on the bumper and lower section of the front of the bus. Conversely, that portion of the front of the bus under the driver's floorboard and in particular the front bumper of the bus provide substantial structural and impact absorbing capabilities. Plaintiff-Appellants allege that serious or even fatal injuries can and do result from relatively low speed impacts (in the 15 to 30 mph range) in collisions with high profile objects. As part of their case in chief, plaintiffs consulting engineers submitted an entire redesign of the front of the bus above the driver's compartment floorboard and specifically the driver's compartment. One of the components of the redesign was a "driver's cage" to be incorporated within that portion main framework of the existing design above and below the driver's floorboard. All components and structure above the floorboard other than such items as windshields, windows, the outer "skin" and plastic dash components, ventilation ducts were retained and the driver's cage was merged into the existing structure both above and below the floorboard. A further subcomponent of the driver's cage is an airbag which becomes necessary only by reason of the new design which

will cause increased deceleration of the driver as front end crush is moved to the rear of the driver. It is the position of Plaintiffs' engineers that the addition of an airbag to the existing MCI design of the bus would serve no purpose whatsoever. Other than the addition of an airbag, and a three-point seatbelt, all the other elements of the redesign are not mentioned in the FMVSS, particularly the driver's cage portion of the redesign. Thus, the issue devolves to the question: are airbags preempted when they become an integral and component part of equipment and a design to deal with a defect and safety issue that is not mentioned or otherwise addressed in the FMVSS, i.e. a total under design of the entire front structure of the bus?

Christina Hurley is Fred Hurley's wife and her claim is based upon the Illinois law of loss or consortium and services owing to the severe injuries to her husband.

The Hurleys' claim in this matter is that the front of the bus above the floor board is woefully under-designed and as such is a manufacturing defect for which there are no federal standards and in particular, that Federal Standard 208 bears no direct application to the same proffered redesign. Plaintiffs have attempted to incorporate those portions of Defendant MCI's design which represent good engineering considerations such as the engine in the rear over the drive train and the front driver's view being preserved to the utmost with the driver sitting forward of the front wheels of the vehicle maximizing the ability to observe traffic and pedestrians in close proximity to the bus. Plaintiffs' engineers' design is intended, therefore, to simply increase the structural capacity of the vehicle to sustain an impact from a high profile object such as the rear of a truck trailer, or the corner of a truck trailer bed, or some other

object which would impact on the driver's compartment either before or after the front bumper of the bus is engaged. It is conceded the design proposed by Plaintiffs herein increases the deceleration forces on the driver and as such it requires a re-design of the driver restraint systems to keep the operator within established deceleration and force guidelines. This petition asks, can a manufacturer of a vehicle such as the one in question be protected from a patently obvious performance defect by a standard that has no applicability to the performance issue being addressed. Moreover, how can there be implied preemption when the design standard can still be met with a combination of the devices that are available and offered under the standard itself.

Plaintiffs filed their lawsuit in the Circuit Court of Madison County in the Illinois state court system in late 1994. The matter was removed by the defendants as outlined in the Court of Appeals' decision. (App. 3-4) After extensive discovery, including multiple rounds of expert witness depositions, the respondent MCI (Motor Coach Industries) filed and amended answer raising 49 U.S.C. 30103 (b) for the first time. Thereafter, an extensive summary judgment motion was filed by respondent and briefed by the Parties. The District Court granted Summary Judgment Oct. 1, 1998. The District Court on page 10 of its opinion and order (App. 23-25) clearly decided that this matter was preempted by reason of the fact that a Plaintiffs' cause of action that is based upon a claim that the manufacturer's choice of safety equipment created an inherently dangerous vehicle are preempted. The operative message in the District Court's opinion is that Plaintiffs cannot under any circumstance criticize the choice of the manufacturer as it relates to passive restraint systems. In

reaching this decision the District Court specifically relied upon the seventh circuit decision in *Gracia vs. Volvo Europa Truck, N.V.*, 112 F. 3d 291,296 (1997). This is a particularly heinous result when the manufacture is not required to prove that its choice met the performance standards of the same act.

Timely notice of appeal was filed to the United States Court of Appeals for the Seventh Circuit. This matter was argued on the Thursday immediately following this Court's grant of certiorari in *Geier vs. American Honda*, supra. The seventh circuit clearly waited for this Court's decision in *Geier*. The Court of Appeals affirmed the trial court. (App. 1-13). In its decision the court acknowledged that if preemption existed that it would be implied preemption relying on *Geier*, supra. However, most importantly, just a his the trial court below they concluded that the primary issue relative to preemption must be determined by the issue of choice of design options. The court specifically held that ruling of this Court in *Geier* is consistent with their decision in *Gracia vs. Volvo Europa Truck, N.V.*, supra, and that they would have reached the same conclusion in any event strictly based upon "choice" or manufacturer's options.

> "The point is that, as in *Geier*, the decision to leave options open to bus manufacturers was made with specific policy objectives in mind. Hurley's suit, if successful, would undermine that policy objective and is therefore preempted.
>
> Even before *Geier*, our own case law would have led us to the same result. See *Gracia vs. Volvo Europa Truck N.V.*, 112 F. 3d 291 (7th Cir. 1997). The arguments Hurley offered to distinguish *Gracia*

> are the same at his those he would raise to avoid *Geier*, and so we addressed them briefly. In his view, FMVSS 208 does not speak to his particular problem. He maintains that his theory of uncrashworthiness is limited to the ability of the bus to protect the driver in high-profile impacts (i.e. impacts with trucks or other large vehicles were the point of collision is above the bumper). We are unimpressed by this distinction. The ability to withstand high-profile impact is one aspect of that general topic of crashworthiness that at MVS 208 addresses. Otherwise, the *option* (emphasis added) that both *Geier* and *Gracia* preserved for manufacturers would be eviscerated by the particulars of the crash in question. *If a vehicle meets the basic crashworthiness standards of FMVSS. 208, the after the fact details of the Plaintiffs's particular injuries do not, and cannot, matter.* (Emphasis added). As *Geier* (and *Gracia*) held, a state law tort action that forecloses an *option* (emphasis added) left open to the manufacture is preempted under FMVSS 208. (App. 11).

Therefore, it is clear that both the District Court and the Court of Appeals based their decision of implied preemption largely, if not exclusively, on the issue of loss of choice. Neither the Department of Transportation, NHTSA, or this Court have ever relied solely upon choice or option as the litmus test for preemption under the Act. As such, it is respectfully submitted that the decisions of both courts are, therefore, fundamentally unsound, more importantly, fundamentally unsafe *Geier* (and *Gracia)* held, a state law tort action that forecloses an option (emphasis added) left open to the manufacture is preempted under FMVSS 208. Therefore, it is

clear that both the District Court and the Court of Appeals based their decision of implied preemption largely, if not exclusively, on the non-issue of the manufacturer's loss of choice. Neither the Department of Transportation, NHTSA, nor this Court have ever relied solely upon *choice* or *option* as the litmus test for preemption under the Act. As such, it is respectfully submitted that the decisions of both courts are, therefore, fundamentally unsound, more importantly, fundamentally unsafe for the consuming public.

REASONS FOR GRANTING THE WRIT

When Congress enacted the Safety Act in 1966, it unequivocally discussed safety in terms of "performance standards" and directed the Secretary of Transportation to set those standards. Standard 208 is simply entitled "Occupant crash protection" both section I and section 2 of the standard set forth "performance standards" and in section 2 be "design criteria" to the extent that the secretary can "specify equipment requirements" that meet the crashworthiness performance requirements of the standard. Both the Seventh Circuit Court Of Appeals and the District Court Opinions contravene these plain words and conflict with the rulings of two other Circuit Courts of Appeals and one State Court Of Appeals that have addressed this Court's ruling in *Geier vs. American Honda,* supra. The Seventh Circuit's ruling also demonstrates and increases the confusion created by this Court's decisions in *Myrick* and *Geier* concerning the Safety Act's preemptive affect. Finally, the decision blow incorrectly answers an important federal question that this court addressed, in part, that has not been, but should be, decided by this Court: whether Congress intended the Safety Act to preempt state common law claims when a manufacture uses equipment specified by the Secretary of Transportation with out any concomitant showing that the equipment chosen by a manufacture also met the performance standards specified and designated by the Secretary. This court should grant review to resolve the conflict among the federal courts of appeal and the obvious potential conflict that will arise in the state courts of last resort as exemplified by the Indiana Court Of Appeals.

1. The Decision Below Conflicts with the Decisions of this Court Involving Implied Preemption and is a Case of First Impression Regarding an Allegation of Structural Defect Arising out of a Complete Failure of a Vehicle To Meet the Minimal Performance Requirements of the Act. The Redesign of the Entire Driver's Compartment Requires The Use of Multiple Passive Restraint Devices All of Which Are Specified in the FMVSS.

The Court of Appeals' decision expands and exacerbates the misconception among the various circuit courts of appeals concerning "choice" of options as the standard for compliance and therefore preemption and it will most certainly create conflict with the various states courts of last resort.[1] This court finds itself in a unique

[1]This court is obviously familiar with the unsettling history of preemption as it relates to the FMVSS and the Act itself. Prior to *Geier* many of these states courts of last resort chose to interpret the savings clause literally and to preserve the right of the citizens of their respective states to maintain a common law products liability cause of action alleging a failure to use appropriate safety equipment in vehicles sold for use in their states. See *Drattel vs. Toyota Motor Corp.*, 699 NE 2d 376, 381 (New York. 1998) which contains an exhaustive dissertation and listing of all the states that denied express or applied preemption despite rulings by the United States Circuit Court of Appeals to the contrary. There was a clear dichotomy of opinion that in the federal courts of this country that preemption existed and in the state courts of this country that the savings cause prevailed. Thus, the litigant in the state court would be entitled to go to the jury a neat issue of defect and the litigant in the exact same state in a federal court would be subjected to summary judgment without proof and without a trial. This is a particularly heinous result when the court houses are across the street from each other as they are here in the City of St. Louis. There's absolutely no reason to believe that the state

(Footnote 1 continued on next page)

position to clarify this issue immediately and without any harm to its decision in *Geier*. As indicated, the history behind this Court's decisions on this issue has clearly demonstrated a lack of finality on the issue and has, in fact, often resulted in ongoing confusion which certainly was the exact opposite result that this Court intended whenever it accepted Certiorari on an issue involving conflict between the various circuit courts of appeals and state courts of last resort. Unfortunately, when the fog is lifted a heavier and thicker smog roles in. This Court need look no further than its history on this issue as set forth in a trio of cases covering the last ten years.[2] In *Wood* the United States took the position that certiorari was not required due to the fact that there was not any conflict between the various circuit courts of appeals. At that time, for different reasons, the various state courts of appeals and the federal circuit courts of appeals were ruling in favor of preemption and only one intermediate state court had ruled to the contrary. Amicus brief of the United States (App. 53-63)

This Court next addressed this issue in *Freightliner Corp. vs Myrick* wherein the United States took the express opinion that the Plaintiffs claims were neither expressly nor impliedly the preempted because the standards were expressly written in terms *of performance. It* was the government's position that if the brakes on a vehicle failed to perform as required Plaintiffs claims of preemption would not be barred not only as a matter of law but also as the public policy of

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(Footnote 1 continued)

courts of last resort will apply the language of this Court's opinion on page 1918 of *Geier* suggesting that allegation of failure to perform would not be preempted as a matter of law.

[2] *Wood vs. General Motors Corp., Freightliner Corp. vs. Myrick, and Geier vs. American Honda Motor Co., Inc.*

NHTSA. See the brief of the United States has Amicus Curiae including footnote 10. (App. 64-73)

In the wake of *Myrick*, this Court declined to revisit the issue of preemption under the Safety Act on *at least* four separate occasions essentially determining that the issue was not ripe for further review.[3] However, this court did accept certiorari on *Geier* to resolve the clear dichotomy between the United States courts of appeals and the various states courts of last resort. It is respectfully submitted that this issue is ripe for determination due to a disparity between at least three circuit courts and one state intermediate court of appeals at this time coupled with the ongoing potential for a lack of conformity in other state courts of this country. The issue before this court is one of substance over form. It is always been the government's position that performance (substance) by the manufacturer in terms of the performance standards would determine the liability or lack thereof on a state law claim based on an alleged design defect arising out of the failure to equip a particular vehicle with certain types of safety equipment. We must reiterated that it has always been the position of NHTSA that "state courts, however, are not precluded by those (equipment) provisions from entering tort judgments in cases raising the claim that a vehicle or item of equipment was the defectively designed with respect to the same aspect of performance". See the Amicus brief of United States in *Freightliner Corp. vs Myrick* . (App. 67)

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3 *Volkswagen of America, Inc. vs. Hernandez-Gomez,* 514 U.S. 1094, 115 S.Ct. 1819 (1995), *Hernandez-Gomez vs. Leonardo 11,* 185 AZ 509, 917 P 2d (1996). (Cert. denied), *Tebbetts vs. Ford Motor Co.,* 140 NH 203, 665 A. 2d 345 (1995) (certiorari denied), and *Montag vs. Honda motor Co., Ltd.,* 75 *F.*3d 1414 (10th circuit) certiorari denied, 519 U.S. 814 (1996)..

The government reiterated this position in Geier stating explicitly" that petitioners' (sic) claims are not preempted merely because the Secretary made airbags one of several design options that manufactures could choose". See footnote 18 on page 21 Amicus brief of the United States in *Geier*. (App. 82) It is interesting to note that in the same footnote to government goes on to state that "The Secretary could have imposed performance requirements that effectively required an air bag design". In so doing they quoted from the congressional record indicating that "performance standards expected to affect design". On page 21 of its brief government goes on to state unequivocally that when a performance standard sets forth minimums frequently state law claims cannot be preempted. This Court extracted the government's example relating to antilock brakes and stopping distances out of its brief and inserted almost in verbatim on page 1918 of its opinion in *Geier*. It is this rule of law, i.e. substance over form, performance vs. design that is given rise to the conflict which requires this Court to intervene yet again in this complicated area of law.

In Petitioners' opinion, the primary difficulty with any in depth analysis of any of these cases reveals that often the Record on Appeal arose out of a *summary vs. plenary proceeding*. Every time an appellate court passes judgment on an entire class of cases without all of the facts, the court potentially issues an uninformed ruling which will mushroom at an alarming rate as the rulings are passed from court to court, summary judgment to summary judgment. An analysis of the facts is necessary before an analysis of the law makes any sense in a given circumstance. While this court has some of the facts that relate to the accident in question, the record

is woefully inadequate particularly as it relates to the defendant/appellee's affirmative defense based upon compliance with a single design standard of the entire regulatory code. They put in the seat belt. They did nothing more and they could accomplish no less because there was nothing less to do other than not put in any type of passive restraint. There is absolutely no evidence that the respondent ever tested this vehicle to determine whether or not it complies with the performance aspects of the FMVSS. On the contrary, as will be pointed out herein and as was established in our brief and petition for rehearing, there is evidence that respondent **never tested this** vehicle. They have pleaded that they met the requirements of FMVSS #208. Rule 12 (b) of the FRCP establishes that this is an affirmative defense. The only proof to support that affirmative defense is the installation of the manual, self-adjusting, "Type I" lap belt. Once again, they have done nothing more and they could not have done anything less.

The defendant's reliance on the FMVSS requires proof that they met the entire standard and not simply the threshold factual analysis that they installed a single piece of equipment "authorized" by the regulatory scheme. The FMVSS cannot be read piecemeal. The regulations regarding "crashworthiness"[4] must be read in their entirety and certainly together as they relate to

[4] There is no definition of crashworthiness in the standard. However, at the National Highway and Traffic Safety Administration's Web page there is a definition of "crashworthiness" in the area referred to as "research and development". It describes crashworthiness as the "use of **occupant restraint systems** and changes to the vehicle structures to minimize the severity of occupant injuries" (App. 51). In so doing, NHTSA acknowledges the relationship between **vehicle structure** and the passenger restraint system. Meeting the design standard of the one without consideration of the other would be futile and foolish.

the *scope and purpose* of the standards to wit:

> S1. *Scope.* This standard specifies ***performance requirements*** (emphasis added x 3 bold, italics, & underlined]) for the protection of vehicle occupants in crashes.
>
> S2. *Purpose.* The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirement's in terms of forces and accelerations measured upon anthropomorphic dummies in test crashes, and by specifying the specific equipment requirements for active and passive restraint systems.

All four judges that have addressed this issue have obviously concluded that any equipment that is specified and installed has presumably been tested and it must have met the "performance requirements" of the FMVSS. But is this true? Where is the proof? In the absence of either testing or proof of "performance" every judge who has looked at this case is necessarily ruling upon a statutory affirmative defense that is unequivocally a holographic image that owes its existence to nothing more than reliance on partial compliance with regulatory standards. This creates a half truth which in effect is the worst kind of lie because it is cloaked with aura of truthfulness. It is, however, not the truth, the whole truth and nothing but the truth. Therein lies the distinction between something that is "true and correct" versus the "whole truth". The whole truth in this case and likely in hundreds of similar cases is that the respondent never attempted to meet the performance requirements of the statute and therefore cannot say

they complied with the standards set forth by Secretary.

Furthermore, despite our best efforts, we have been unsuccessful in our attempts to get the courts to consider the undisputed fact that no definitions of "crashworthiness" can be found in the standards. Similarly, there are no standards for the complete construction of the passenger/driver compartment of the vehicles governed by this regulatory scheme.[5] We have been unable to convince any of the four judges that have looked at this matter that the absence of any such definition is critical to the analysis because it requires the Court to look to other "standards" in the regulatory scheme and in particular S5 & S6 relating to "crash protection requirements" and "injury criteria" to determine "crashworthiness" *performance*. For example on page 10 of the opinion, Judge Wood, writing on behalf of the panel, states,

> "the ability to withstand high profile impacts is one aspect of the general topic of crashworthiness that the FMVSS 208 addresses.[6] Otherwise, the option that both *Geier* and *Gracia* preserve for manufacturers would be of eviscerated by the particulars of the crash in question *if a vehicle meets the crashworthiness standards of FMVSS* 208.". (emphasis added) (App. 11)

The record before this court does not contain a single scintilla of evidence that this vehicle meets "the crash-

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[5] When this case is tried there will be evidence that auto manufacturers use passenger compartment cages in their small and mid size cars presumably because the passenger restraint and injury criteria cannot be met unless there is a marriage of passenger restraint and structural performance.

[6] How does the standard address the issue of high profile impacts?

worthiness standards of FMVSS No. 208" as suggested by decision. Assuming, arguendo, that FMVSS 208 applies to "crashworthiness" as suggested by its title and assuming further that its purpose and scope must necessarily relate to that definition, then "crashworthiness" must be defined in terms of performance standards to prevent injuries. Therefore, the true "crashworthiness" standards are set out in S5 & S6 of standard 208. Those standards are silent as to the construction of the vehicle structure. There is absolutely no evidence that the respondent met or exceeded those performance standards in anyway, shape, or form. There is only one piece of evidence before this court. The evidence that the defendant chose to meet the equipment requirements (design requirements) with the most cost effective (cheap) equipment option available to them. Sometimes it is best to observe a phenomenon from the opposite viewpoint. If this bus had been delivered without any type of passive restraint equipment specified in FMVSS No. 208 and this same collision occurred, should the plaintiff be granted a summary judgment and go to the jury on damages only or should the trial court require the plaintiff to prove that the presence of the seat belt would have met the performance aspects of the standard or, more simply stated, that it would have made a difference?

Ironically, the Seventh Circuit Court of Appeals has ignored one of its own cases that illustrates this phenomenon quite well. *DePaepe vs. General Motors Corp., 141* F. 3d 715, 718 (7th Cir. 1998). Briefly, in that case the plaintiff pleaded that the failure of General Motors to put a padded visor in its car in violation of FMVSS No. 201 was substantially all that the plaintiff was required to prove in order to retain a substantial verdict. The Seventh Circuit held unequivocally that the presence or

absence of a design standard feature does not address the more critical issue of performance. It would be fundamentally unfair to require the plaintiff in an automotive product liability case to prove lack of performance when a design standard has not been met by the manufacture and yet require no proof on the part of the manufacturer that met a design standard that they also met the requisite performance standard.

2. The Decision Below Conflicts with the Decisions of Three Other Circuit Courts of Appeals and Will Certainly Conflict with the Opinions of the Various States' Courts of Last Resort.

The United States Court of Appeals for the Fifth Circuit has clearly issued a authoritative opinion that discusses the issue of design vs. performance. *Perry vs. Mercedes-Benz of North America, Inc.*, 957 F.2d 1257, 1266-68 (5th Cir. 1992) The Fifth Circuit ruling is actually in keeping with the ruling and *Geier,* supra. In its opinion the Fifth Circuit states that even if the design theoretically met minimal performance standards, the manufacturer could still be sued because the driver was injured in a collision wherein the forces were well within those forces that the standard was attempting to eliminate, i.e. it didn't work.[7] Unlike *Geier* and unlike the panel decision herein, the facts of the accident are clearly enumerated in the Fifth Circuit's opinion. The plaintiff's argument was that the speed of her

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[7] In Perry, supra, the plaintiff drove into a ditch at the end of a "T" intersection and received substantial injuries to her teeth and mouth. She claimed she was traveling between 40- mph at impact and Mercedes had "expert" and eyewitness evidence that she was

(Footnote 7 continued on next page)

car at impact was in excess of the trigger speed enumerated in the FMVSS and that the air bag should have deployed but it failed to do so. Also, the argument clearly related to a collision in an earthen ditch versus a concrete barrier collision which is, of course, the subject matter of FMVSS No. 208. The Court in *Perry* obviously assumed that Mercedes-Benz met both the design and the performance standards of section 208. Notably, however, the opinion is silent on the issue of whether or not Mercedes-Benz introduced evidence that they had tested and met the performance standards. Clearly, there was evidence that they had met the design standards.

This Court has specifically stated that an analysis of the collision facts as they relate to performance is obligatory in the final analysis. *Geier*, 1918, 1919. As indicated previously, this Court's opinion is silent on the issue of testing by American Honda. However, this is not an issue in Petitioners case. The Court is blessed with the *established fact* that the respondent has testified under oath that it *never tested the front of this vehicle in a barrier collision to determine whether or not it met the standards set forth in S5 or S6 of FMVSS No. 208* Petition for Rehearing EnBanc (App. 52). Furthermore, it is also undisputed by all the engineers who testified in this case that the *delta* V (or the equivalent of a barrier impact speed) was only 23.5 mph. Section 5 of the Act requires no injuries or minimal injuries at 30 mph. This

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(Footnote 7 continued)

traveling between 10-20 mph. Not coincidentally, the trigger speed for the mechanism was 15 mph. She was not wearing a seat belt. The air bag failed to deploy. In *Hurley* the parties agree as to the speed and more importantly the delta V of the bus whereas the parties in *Perry* disputed the accident speed as the time of impact.

accident took place well within the performance standards set forth by the Secretary and yet petitioner Hurley has essentially lost the use of both of his legs, suffered internal injuries, and often serious injury as well. It is respectfully submitted that this is exactly the type of tort claim that the Secretary intended to be preserved under the savings clause of the Act.

On July 25th, 2000 (the same day that the Seventh Circuit decided *Hurley)* the 10th Circuit reached the exact opposite conclusion on a preemption case and in so doing actually reached the same conclusion as the Fifth Circuit in *Perry,* supra. *Choate vs. Champion Home Builders Company,* 222 F.3d 788,793 -795 (10th Cir. (Okla.). That case involved a claimed preemption under the Manufactured Housing Act and regulations promulgated thereunder by the Department of Housing and Urban Development (HUD). The 10th Circuit concluded that the Plaintiffs' claim was preserved because it "seeks to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a Floor. *Geier* at 119". Applied to the facts of the *Hurley* case, S5 and S6 of the FMVSS set the "minimum floor" and the Hurley alternative design simply seeks to establish greater safety than minimum safety achieved by a federal regulation intended to provide a floor. This, of course, presupposes that the defendant met "the floor" in the first instance which is a both unproven and highly debatable supposition at best.

The sixth circuit reached exactly the opposite conclusion of the seventh circuit in *King vs. Ford Motor Co.,*

209 F.3d 86 (6th cir. (KY) 2000).[8] The decision of the sixth circuit in *King,* supra and the decision of the seventh circuit in *Hurley* are absolutely and totally irreconcilable! This court must therefore decide whether the analysis of the sixth circuit in *King is* in keeping with its decision in *Geier* or whether the analysis of the seventh circuit in *Hurley* appropriately sets forth the standards and rule of law for preemption under the Act.[9]

The sixth circuit relied on *Perry* in reaching its decision. The seventh circuit chose to ignore *Perry* largely due to its erroneous interpretation of the preemptive force of the act as set forth in its previous opinion of *Gracia vs. Volvo Europa Truck Company,* supra.

It is with sad irony that petitioners note that with the exception of their case, when federal courts of appeals have had a *plenary* record before them they have sided with the savings clause of the Act as it relates to failure to perform. The *King* case was tried to a jury and all the facts were before the court. The Ford vehicle in that case was equipped with a fully automatic shoulder harness and a knee bolster. This met the design criteria of the Act. However, the *delta* V at the time of the collision was

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[8] In King plaintiffs claim of inherently dangerously designed seat belts was multifaceted as our plaintiff Hurley's claims on this matter. Essentially, plaintiffs claim was that the passive restraint system chosen by Ford was defective because it failed to use load limiters and/or change the location of the knee bolster and/or change the location of the belt anchor.

[9] The seventh circuit makes specific reference to this court opinion in *Geier* and overlooks its analysis of minimum standards. The sixth circuit opinion was published in April prior to this Court's decision in *Geier* but the application for re-hearing was denied in June after the publication of *Geier.*

only 27 mph and the plaintiff sustained grievous and ultimately fatal injuries in that collision[10].

A similar result was reached by the Indiana Court of Appeals in *Rogers -v- Cosco, 2000* WL 1641158 (Ind. App. Nov 2, 2000). Cosco is the manufacturer of motor vehicle booster child restraint devices. The area is regulated by section 571.213 of the FMVSS as promulgated by the Secretary. Section 213 has the same purpose and scope language as section 208. In determining that the standard only set forth minimum requirements the court quoted with approval this Court's language in *Geier* found at page 1918 of its opinion as stated and we quote:

> Thus, as Geier explicitly provides, a State may impose a stricter standard through the agency of its general common law of torts. We conclude that there is no conflict between Rogers proposed tort remedy and the minimum standards of the FMVSS 213. Therefore, Roger's attempt to impose a greater safety standard through the prohibition of boosters seats such as the Grand Explorer for children under forty pounds in not preempted by the Safety Act. Thus, the trial court erred in granting summary judgment on this basis. *Id.* Page 7 West Law opinion.

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[10] Remember the Act sets forth minimum performance criteria at 30 mph, supra

3. The Opinion of the Court Of Appeals Is Contrary to the Published Legal Opinion of the Secretary of Transportation and NHTSA.

The Circuit Court of Appeals has relied largely on its own opinion in *Gracia vs. Volvo Europa Trucks Company, Inc.* 112 F. 3d 291 (7th cir. 1997). Other circuits that have reached similar conclusions with respect to the issue of "choice" are the Third, Ninth, and Eleventh respectively.[11] *Harris and Gracia,* infra clearly stand for the proposition that the plaintiff cannot impose a design alternative which would have the effort of causing a manufacture to lose its choice of options as outlined in the FMVSS. *Pokorny and Irving,* infra would seem to suggest the same. As previously pointed out in section I of this application, this is clearly not the position of the Secretary nor NHTSA itself. The government's position is and always has been that the manufacturer's compliance with the design standards of the Act does not, in and of itself, relieve the manufacture from liability . Wood *vs. General Motors Corp.,* No. 89 - 46 (October term, 1989) (App. 61), Brief for the United States as *Amicus Curiae. Freightliner Corp. vs. Myrick et al.* No. 94 - 286 (October term 1994) (App. 67) Brief for the United States as *Amicus Curiae. Geier vs. American Honda Motor* Co., Inc. No. 98 - 1811 Brief for the United States as *Amicus Curiae.* (App. 87) To the extent that these circuit court cases suggest that a manufacture discharges its duty under the act by throwing a dart at a list of equipment options published by the Secretary, this Court needs to overruled them explicitly.

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[11] *Pokorny-v- Ford Motor Co.,* 902 F.2d 1116, (3d Cir. 1990), *Harris vs Ford Motor Co.,* 110 *F.* 3d 1410 (9th Cir. 1987), and *Irving vs. Mazda Motor Corp.,* 136 F. 3d 764 (11th Cir. 1998).

The Court should grant review to insure that its rulings and the rule of law with respect to preemption is strictly followed so that the Hurley's — and thousands of similarly situated Americans — are not wrongfully and perhaps "illegally" denied their right to present their evidence in a court of law.

CONCLUSION

This petition for writ of certiorari should be granted

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No.98-3888

FREDERICK A. HURLEY and CHRISTINE A. HURLEY,
Plaintiffs-Appellants,

v.

MOTOR COACH INDUSTRIES, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 95-169-CJP — **Clifford J. Proud**,
Magistrate Judge.

ARGUED SEPTEMBER 16, 1999 —
DECIDED JULY 25, 2000

Before RIPPLE, MANION, and DIANE P. WOOD, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* While driving a Greyhound bus from St. Louis to Columbus, Ohio on February 25, 1993, Fred Hurley was involved in a serious accident with a jack-knifed double trailer. Hurley himself suffered severe lower body injuries in the collision, which collapsed the front wall of the bus. The bus that Hurley was driving was equipped only with a standard two point seat belt. It had neither an airbag nor any structural enhancements that would provide additional protection to the driver in the event of a high speed crash like the one in which he was involved. Hurley believes that these flaws make the bus he was driving unreason-

ably dangerous and, consequently, render the bus's manufacturer, Motor Coach Industries, liable for his injuries.

He and his wife (whose loss of consortium claims are entirely dependent on his success in this litigation) thus decided to sue Motor Coach, as well as Consolidated Freightways (the operators of the trailers that his bus hit), Road Systems, Inc. (the makers of the trailers that Hurley struck), and Pines Trailer Corporation (another trailer manufacturer). Hurley began in Illinois state court, but Consolidated Freightways removed the action to the District Court for the Southern District of Illinois on diversity grounds. After the removal, Hurley settled his claims against Consolidated Freightways and Road Systems and dismissed Pines under Fed. R. Civ. P. 41(a). Except as they relate to a jurisdictional problem that we address below, Hurley's claims against these parties are not at issue in this appeal. The parties agreed to submit their case to a magistrate judge, as 28 U.S.C. § 636(c) permits. Finding that Hurley's case was preempted by the federal crashworthiness standard, Magistrate Judge Proud dismissed the action; this appeal followed.

I

Before we discuss the merits of Hurley's appeal, we must address a potential jurisdictional problem. Hurley's original suit involved four defendants — Motor Coach, Consolidated Freightways, Road Systems, and Pines Trailer. For jurisdictional purposes, the Hurleys are citizens of Arkansas. Motor Coach is a Delaware corporation with its principal place of business in Arizona. Consolidated Freightways is also a Delaware corporation, but its principal place of business is Oregon. Road Systems is a California corporation and its principal

place of business is there, too. Finally, Pines Trailer is an Illinois corporation with its principal place of business in Illinois. Complete diversity, which is required for jurisdiction under 28 U.S.C. § 1332, therefore exists between the Hurleys and all defendants. (Given the severity of Hurley's injuries, nobody is contesting the adequacy of the amount in controversy.)

Not every diversity case qualifies for removal, however. For cases that start out in state court, where it is the defendant who wants the federal forum, there is an additional hurdle to clear before successfully reaching federal court. Under 28 U.S.C. § 1441(b), a non-federal question case "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." This rule, sometimes called the "forum defendant" rule, means that Pines's presence in the case, if proper, would normally keep the case in state court. We say "normally" because in the typical case, a plaintiff who is about to see her chosen court slip away will object to removal if there is an in-state defendant, and thereby secure a speedy return to state court.

That did not happen in this case. After the defendants filed their removal petition, Hurley did nothing. Since 28 U.S.C. § 1447(c) gives plaintiffs only 30 days to object to removal, Motor Coach argues that Hurley has waived any objection to removal. Of course, waiver is possible only if the forum defendant rule is nonjurisdictional; true jurisdictional flaws are nonwaivable and can be raised at any time. See, *e.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("subject-matter delineations must be policed by the courts on their own initiative even at the highest level"). Section 1447(c) spells out this fundamental rule for removed cases, where it states

specifically that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Justice Kennedy explained the bedrock importance of the rule requiring courts to notice jurisdictional defects at any time in *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988):

> The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority.

Id. at 77

We must decide, therefore, whether the forum defendant rule is jurisdictional, in the sense we have been using the term, or if it is of a lesser status. That question has been bouncing around the federal courts of appeals for more than 75 years, yet oddly enough it remains unresolved in this circuit. *LaMotte v. Roundy's, Inc.*, 27 F.3d 314, 316 n.3 (7th Cir. 1994). The overwhelming weight of authority, however, is on the "nonjurisdictional" side of the debate. Compare *Korea Exch. Bank v. Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1995) (nonjurisdictional); *In re Shell Oil Co.*, 932 F.2d 1518, 1522 (5th Cir. 1992); *Farm Constr. Serv. v. Fudge*, 831 F.2d 18, 21-22 (1st Cir. 1987); 428 F.2d 880, 882 (2d Cir. 1970) (Friendly, J.) (nonjurisdictional); *Bailey v. Texas Co.*, 47 F.2d 153, 155 (2d Cir. 1931) (L. Hand, J.)

(nonjurisdictional); *Hanley-Mack Co. v. Godchaux Sugar Co.*, 2 F.2d 435, 437 (6th Cir. 1924) (nonjurisdictional) with *Hurt v. Dow Chemical Co.*, 963 F.2d 1142, 1145-46 (8th Cir. 1992) (jurisdictional). See also *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1258 (11th Cir. 1999) (interpreting 1996 statutory changes as resolving the conflict and making the forum defendant rule waivable).

A number of reasons persuade us that the majority rule is the correct one. First, the theme of several recent Supreme Court decisions that have — considered curable defects in diversity jurisdiction has been to find that as long as the court's jurisdiction is proper at the time of trial and judgment, the case need not be dismissed because of an earlier jurisdictional problem. This was the precise holding of *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), where the question was whether a lack of complete diversity at the time of removal required dismissal, even though all claims concerning the nondiverse defendant were settled and that party was dismissed before the trial began. The Court held that the answer was no, explaining that "the *jurisdictional* defect was cured, *i.e.*, complete diversity was established before the trial commenced.... But a statutory flaw — Caterpillar's failure to meet the § 1441(a) requirement that the case be fit for federal adjudication at the time the removal petition is filed — remained in the unerasable history of the case." 519 U.S. at 73 (emphasis in original). Particularly in light of the strong interests in finality, efficiency, and economy that attach to a completed trial, the Court found that the plaintiff's opportunity to raise objections within the 30 days afforded by § 1447(c) was sufficient to protect his interests.

Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989), took the same general approach to a different

problem with diversity jurisdiction. In *Newman-Green,* indeed, the problem was more severe: the case had proceeded to judgment in the district court while an individual whose presence spoiled complete diversity remained a party. The defect in jurisdiction was noticed only at the court of appeals level. The Supreme Court held that Rule 21 of the Federal Rules of Civil Procedure allows the courts of appeals (in addition to the district courts) to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction. Once again, therefore, the note the Court struck is that the last chance for ensuring that jurisdiction is proper occurs as late as the final judgment in the case.

The situation we face is different, and in many ways less troublesome, than the problem the Court encountered in *Caterpillar* and *Newman-Green.* If Hurley's case had been filed in the first instance in federal court, jurisdiction under § 1332 would have been clear. Or, if Hurley had originally filed a state court action against Motor Coach, Consolidated, and Road Systems, those defendants could have removed the case to federal court since none was an in-state defendant. Once in federal court, Hurley could have filed an amended complaint adding Pines, if it turned out that Pines might have been responsible for his injuries. In short, the case as it arrived in federal court met every requirement for federal jurisdiction: it simply took the wrong path, in a sense, because there was an instate defendant. This, we think, is more a matter of removal procedure, and hence waivable, than a matter of jurisdiction.

The policy behind the forum defendant rule also supports the nonjurisdictional characterization. The rule is designed to preserve the plaintiff's choice of a (state) forum, under circumstances where it is arguably less

urgent to provide a federal forum to prevent prejudice against an out-of-state party. After removal, if the plaintiff wants to remain in state court, she can file a timely motion for remand. Under the circumstances, it seems that the only purpose that would be served by declaring the forum defendant rule jurisdictional would be to preserve for plaintiffs rights that the plaintiffs themselves failed to assert. For these reasons, we join the longstanding line of authority that holds that the forum defendant rule is nonjurisdictional. Hurley thus had only 30 days to object to removal based on the presence of Pines in the case (which did not last long anyway, as it turned out that Pines had not built the trailers in question). Since there were no other potential flaws with the district court's diversity jurisdiction, we now turn to the merits of the appeal.

II

Hurley's claim against Motor Coach is an Illinois products liability action. In order to show that Motor Coach's product was unreasonably dangerous, he had to present an alternative design that is "economical, practical, and effective." *Baltus v. Weaver Division of Kiddie & Co., Inc.*, 557 N.E.2d 580, 586 (Ill. App. Ct. 1990). Hurley's experts produced a design that had four basic components: a knee bolster, a three point seat belt, an airbag, and, most controversially, a steel cage (similar to a roll cage on a convertible) that would surround the driver's area. Additionally, the design called for the removal of the front row of passenger seats in order to create a crumple zone, presumably for the protection of the passengers on the bus.

Motor Coach argued to the court below that there are three reasons that Hurley's design is insufficient to get

his claims to a jury. First, it maintained that his design is not economical, practical, or effective because it will be too expensive and, in any event, the steel cage will subject the driver to crushing deceleration in a front-end collision. Next, it contested the qualifications of Hurley's experts under the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), and *Kumho Tire, Ltd. v. Carmichael,* 526 U.S. 137 (1999). Finally, it argued that because Hurley's design forecloses a manufacturer's choice between seat belts and airbags, it is preempted by the National Highway Transportation and Safety Board's (NHTSA) Federal Motor Vehicle Safety Standard 208 (FMVSS 208), 49 C.F.R. § 571.208. The district court's summary judgment in favor of Motor Coach was based solely on the preemption theory.

Specifically, the district court found that Hurley's claim is preempted by FMVSS 208, which is the federal crashworthiness standard. The Illinois products liability cases dealing with alternative designs suggest that there is more than one way of showing that a product as designed by the defendant was unreasonably dangerous, although one possibility is to prove that an "economical, practical, and effective" alternative design would be safer. *Baltus,* 557 N.E.2d at 585. Hurley, however, has put all of his eggs in the "alternative design" basket. As a practical matter, his theory would require manufacturers selling buses in Illinois to incorporate his proposed steel cage, crumple zone, airbag, and three point seat belt, lest they face liability for selling an uncrashworthy vehicle.

Hurley's theory is remarkably close to the one the Supreme Court rejected in *Geier v. American Honda Motor Co.,* 120 S. Ct. 1913, 1922 (2000). In *Geier,* the

Court had to decide whether FMVSS 208 and the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVS), 15 U.S.C. § 1381 *et seq.*, preempted a state common-law tort action in which the plaintiff claimed that an auto manufacturer who was in compliance with the federal standard could nonetheless be held liable for failing to equip its cars with airbags. The Court held that the Act's express preemption provision did not preempt the suit, but that ordinary preemption principles continue to apply to this area. Under those principles, it found that the lawsuit actually conflicted with FMVSS 208 and hence the statute, and it could not go forward.

Aside from the fact that Hurley's claim concerns buses and Geier's claim concerned cars, it is hard to see any significant difference between the two situations. The applicable standard for buses like the one that Hurley was driving is found at 49 C.F.R. § 571.208 S4.4.3.1; see also *National Transportation Safety Board Factual Report of Highway Accident Investigation,* CRH-93-F-H018 at 4 (Hurley's bus was manufactured in 1992; its gross vehicle weight was approximately 28,200 pounds.). The regulatory section provides that "[e]ach bus with a gross vehicle weight rating of more than 10,000 pounds shall comply with the requirements of S4.4.2.1 or S4.4.2.2." That "or" is critical, since 54.4.2.1 calls for a "complete passenger protection system" for the driver; it must comply with crash protection requirements found in S5 of FMVSS 208. On the other hand, S4.4.2.2 requires only a seat belt assembly; it, too, is subject to guidelines, but what is important for our case is that it does not require an airbag or a three point seat belt, as Hurley's design does. Nobody doubts, and indeed Hurley argued in his brief, that under his theory the manufacturer loses the choice between two point seat belts and the comprehen-

sive system that his engineers have designed. Motor Coach's argument is thus a fairly straightforward one — because federal law gives bus manufacturers a choice as to the driver protection systems installed in a particular bus, an Illinois tort suit that rests on a theory that forecloses that choice is preempted.

Geier confirms Motor Coach's theory that a state lawsuit that forecloses an option left open by FMVSS 208 is in fact preempted. In *Geier,* the Court traced the history of FMVSS 208 and concluded that Congress and the Department of Transportation expressed a preference for leaving to manufacturers the choice between airbags and other types of safety devices (at least for the period in time during which the plaintiff's car was manufactured). *Geier* noted the controversy over the efficacy and utilization of airbags and seatbelts and concluded that FMVSS 208 "deliberately sought variety" by leaving the choice of passenger protection system up to manufacturers. *Geier,* 120 S. Ct. at 1924.

One particular aspect of *Geier's* discussion of FMVSS 208 is especially relevant here. One of the major problems with which the Department of Transportation needed to deal when formulating standards for passenger cars is a strong aversion among the driving public to seatbelts. *Id.* at 1923-24 (recalling the "fiasco" that resulted when auto-makers installed systems that prevented drivers from starting their cars unless seatbelts were buckled). NHTSA found that this problem was even more acute among heavy vehicle operators. See 53 Fed. Reg. 25336, 25338 (July 6, 1988) (noting that seat belt use among heavy truck drivers is far below the national average for all vehicles). The commentary accompanying the final rules indicates that even the details of seat belt design — such as the retractor mechanism, mount-

ing position, and buckle releases — were hotly debated during the rulemaking process. See *id.* at 25339-41. Consequently, NHTSA's decision to leave the manufacturers of heavy buses with the option of using a two point seat belt that met regulatory standards is quite understandable as a way of promoting safety by encouraging drivers to use the safety equipment that manufacturers install. But Hurley's proposal unequivocally requires a three point seat belt, a requirement that could reduce utilization and thereby undermine FMVSS 208's safety objectives. Perhaps the design would not in fact reduce seatbelt utilization, but that is not the point. The point is that, as in *Geier,* the decision to leave options open to bus manufacturers was made with specific policy objectives in mind. Hurley's suit, if successful, would undermine that policy objective and is therefore preempted.

Even before *Geier,* our own case law would have led us to the same result. See *Gracia v. Volvo Europa Truck, N. v.,* 112 F.3d 291 (7th Cir. 1997). The arguments Hurley offered to distinguish *Gracia* are the same as those he would raise to avoid *Geier,* and so we address them briefly. In his view, FMVSS 208 does not speak to his particular problem. He maintains that his theory of uncrashworthiness is limited to the ability of the bus to protect the driver in high profile impacts *(i.e.* impacts with trucks or other large vehicles where the point of collision is above the bumper). We are unpersuaded by this distinction. The ability to withstand high profile impacts is one aspect of the general topic of crashworthiness that FMVSS 208 addresses. Otherwise, the option that both *Geier* and *Gracia* preserve for manufacturers would be eviscerated by the particulars of the crash in question. If a vehicle meets the basic crashworthiness standards of FMVSS 208, the after-the-fact details of the

plaintiff's particular injuries do not, and cannot, matter. As *Geier* (and *Gracia)* held, a state-law tort action that forecloses an option left open to the manufacturer is preempted under FMVSS 208. The only qualification is the one recognized in Geier — if there are "special design related circumstance[s] concerning a particular type of [vehicle]," then a manufacturer 5 own design decisions may foreclose one or more of the choices left open by the federal standards. *Geier,* 120 5. Ct. at 1927-28. So, for example, if a plaintiff showed that the design particulars of *her* car made airbags the only viable option, then FMVSS 208 would not foreclose the case. This loophole is of no use to Hurley, however; he has pointed to nothing about the design of this particular bus that makes it different from the average "bus with a gross vehicle weight rating of more than 10,000 pounds." 49 C.F.R. § 571.208 S4.4.3.1.

III

We conclude that the Supreme Court's opinion in *Geier* governs Hurley's case and compels the conclusion that when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted. Hurley's proposed design, with three point seat belts and airbags, would preclude a bus manufacturer from exercising the "[s]econd option" contained in S4.4.2.2. The history of the safety requirements for large buses like the one Hurley was driving indicates that these options were important in the overall safety regime created by FMVSS 208. His suit interferes with these federal policy choices. Under *Geier,* it is preempted, and we thus AFFIRM the judgment of the district court.

A true Copy:

Teste:

Clerk of the United States Court
of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 95-169-CJP

FREDERICK A. HURLEY, *et al.*,
Plaintiffs,

v.

MOTOR COACH INDUSTRIES, INC., *et al.*,
Defendants.

ORDER

[Filed: September 30, 1998]

PROUD, Magistrate Judge:

Pursuant to 28 U.S.C. § 636(c)(1), upon the consent of the parties to trial by magistrate judge, this matter was referred to this Court by United States District Judge William D. Stiehl. (Docs. 85, 106 and 107). Before the Court for consideration is defendant Motor Coach Industries' motion for summary judgment (Doc. 147), and necessarily plaintiff's objections thereto (Docs. 151[1], and 155), and the parties' various related briefs (Docs. 153, 159, 172, 201, 211, and 212).

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[1] On the motion of plaintiffs (Doc. 152), a second memorandum in opposition to defendant's motion for summary judgment (Doc. 155) was substituted for the memorandum initially filed by plaintiffs (Doc. 151). (*See* Doc. 154). Plaintiffs' initial memorandum (Doc. 151) included numerous exhibits, which are deemed to still be a part of plaintiffs' memorandum, and a part of the record before the Court because plaintiffs never sought to withdraw them in their motion to substitute.

The Complaint

On February 25, 1993, during a snow storm, Frederick Hurley, a Greyhound Bus Lines driver was operating a bus manufactured by Motor Coach Industries (MCI), the "Model 12" (hereinafter referred to as the "MC-12"). Hurley's bus collided with a jack-knifed tractor trailer causing Hurley extensive, serious injuries, including but not limited to multiple broken bones in his legs, and injuries to his torso and internal organs. Frederick Hurley filed the above-captioned action alleging that the MC-12 bus was defectively designed and unreasonably dangerous. In short, Hurley alleges that the MC-12 was defective in that it was designed with no protection and a lack of structural strength in the front of the bus, thereby providing little or no protection from driver compartment intrusion in event of a collision; and that the bumper or safety system was inadequately designed to handle collision with an object higher than the bumper mechanism on the bus. (*See* Doc. 2). Christine Hurley, Frederick Hurley's wife, joins in this action, asserting a claim for loss of consortium. *(See* Doc. 2)

The Alternative Design

A manufacturer has a duty to produce a product that is reasonably safe. *Baltus v. Weaver Division of Kiddee & Co., Inc.*, 557 N.E.2d 580, 585 (Ill. App. 1st Dist. 1990). A negligence inquiry focuses on the condition of the defective product and the defendant manufacturer's fault. *Id.* The Illinois Supreme Court "has held that a plaintiff 'must present evidence, such as an alternative design which is economical, practical and effective, to the fact finder who determines whether the complained-of condition was an unreasonably dangerous defect.'" *Id.* (quoting *Kerns v. Engelke,* 390 N.E.2d 859, 863 (Ill. 1979)).

"[T]he threshold question of unreasonably dangerous design is not whether the product could have been made safer, but whether it is dangerous because it fails to perform in the manner reasonably to be expected in light of its nature and intended function." *Baltus*, 557 N.E.2d at 586 Plaintiff may prove that a product is not reasonably safe due to a design defect by showing the availability and feasibility of alternative designs available at the time of manufacture, or that the product fails to conform to industry standards, or that the product does not satisfy design criteria set forth in government regulations. *Id.* (citing *Anderson v. Hyster Co.*, 385 N.E.2d 690 (Ill. 1979).

The alternative design proffered by plaintiffs' experts Kelsey and Nelson includes an additional bumper but principally revolves around a cage and incorporates the use of an air bag, a three-point shoulder harness/seat belt system and a knee bolster. (Doc. 155, pp. 3-5; Doc. 151, Exhibit B (Affidavit of H. Boulter Kelsey, Jr., ¶¶ 6, 7 and 11), Exhibit C (Affidavit of William N. Nelson ¶ 9), and Exhibit D (Deposition of H. Boulter Kelsey, Jr., p. 125); *see also* Doc. 148, Exhibit E (January 25, 1996, Deposition of H. Boulter Kelsey, Jr., pp. 217-218, and 265), and Exhibit G (July 8, 1997, Deposition of H. Boulter Kelsey, Jr., p. 50), and Exhibit H (July 10, 1997, Deposition of William Nathan Nelson, pp. 43-44, and 48)).

Arguments Regarding Summary Judgment

Defendant MCI argues that

(1) The alternative design proffered by the plaintiff is itself defective, unreasonably dangerous, and not feasible,

(2) Plaintiffs' expert testimony cannot satisfy the preliminary test for admitting scientific evidence

under Fed.R.Evid. 702, as announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 579 (1993); and

(3) Federal Motor Vehicle Standard 208 (49 C.F.R. § 571.208, S4.4), relating to occupant crash protection for buses, does not require air bags, which are an essential part of the alternative design proffered by the plaintiffs' expert, therefore, plaintiffs' common-law claim(s) are preempted.

(*See* Docs. 147, 148, 153, 159, and 172).

Plaintiffs counter that their experts, H. Boulter Kelsey, Jr., and William N. Nelson have a feasible alternative design; that the Kelsey-Nelson alternative design can pass the *Daubert* test and therefore be argued before the jury; and that the Federal Motor Vehicle Act does not preempt their common law claim.

Summary judgment is appropriate under Fed.R.Civ.P. 56 where "the pleadings) depositions, answers to interrogatories, and admissions on file) together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). The evidence is construed in the light most favorable to the non-moving party and all justifiable inferences are drawn in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513-14 (1986). Once the moving party has produced evidence to show that he or she is entitled to summary judgment, the non-moving party must affirmatively demonstrate that a genuine issue of material fact remains for trial. *Johnson v. City of Fort Wayne,* 91 F.3d 922, 931 (7th Cir. 1996). In responding to a summary judgment motion, the non-moving party may not

simply reiterate the allegations contained in the pleadings, more substantial evidence must be presented at this stage. "The object of [Rule 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 888 (1990). Moreover, a genuine issue of material fact is not shown by the mere existence of "some alleged factual dispute between the parties" *Anderson,* 477 U.S. at 247, or by "some metaphysical doubt as to the material facts, " *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).

Preemption

Article VI of the Constitution of the United States provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Congress has the authority to preempt state law. "[P]reemption will be found only in those situations where it is 'the clear and manifest purpose of Congress.'" *Gracia* v. *Volvo Europa Truck, N.V.,* 112 F.3d 291, 294 (7th Cir. 1997) (internal citations omitted).

"Federal preemption of state law can occur in three circumstances: (1) express preemption where Congress explicitly preempts state law; (2) implied preemption where Congress has occupied the entire field (field preemption); and (3) implied preemption where there is an actual conflict between federal and state law (conflict preemption)." *Id.*

Waiver

As noted above, defendant argues that Federal Motor Vehicle Standard 208 (49 C.F.R. § 571.208, S4.4), relat-

ing to occupant crash protection for buses, does not require air bags, which are an essential part of the alternative design proffered by the plaintiffs' experts; therefore, according to defendant, plaintiffs' common-law claim(s) are preempted in accordance with the preemption clause set forth in 49 U.S.C. § 30103(b) (formerly 15 U.S.C. § 1392(d)).[2] Pursuant to Fed.R.Civ.P. 12(f), plaintiffs have filed a motion to strike defendant's affirmative defense of preemption. (Doc. 201). Plaintiffs assert that preemption is not listed as an affirmative defense in defendant's answer (Doc. 20), and by waiting until "the eleventh hour," defendant waived the defense.[3] (Doc. 201, p. 2).

In essence Fed.R.Civ.P. 8(c) requires that "any matter constituting an avoidance or affirmative defense" be set forth in defendant's answer. "The purpose of that rule, as courts have long recognized, is to avoid surprise and undue prejudice to the plaintiff by providing her notice and an opportunity to demonstrate why the defense should not prevail." *Venters v. City of Delphi,* 123 F.3d

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[2] In 1994, "The National Traffic and Motor Vehicle Safety Act of 1966," 15 U.S.C. 1381 et seq. (1988), was recodified at 49 U.S.C. § 30101 et seq. (1994), without substantive change. *See* Pub.L. No.103-272, § 1(e), 108 Stat. 943; *see also Gracia v. Volva Europa Truck, N.V.,* 112 F.3d 291, FN 2 (7th Cir. 1997). This Court will make every attempt to offer dual citations.

[3] Defendant MCI filed a motion on November 2, 1995, to dismiss plaintiffs' case pursuant to Fed.R.Civ.P. 12, or alternatively for summary judgment under Fed.R.Civ.P. 56. (Doc. 53). In order to permit plaintiffs' experts to complete their analysis and design, this Court quashed the depositions of Kelsey and Nelson, and directed that dispositive motions be filed after said depositions were completed. *(See* Docs. 132-136). Therefore, the Court cannot fault defendant for not filing their "second" motion for summary judgment (Doc. 147) earlier.

956, 967 (7th Cir. 1997). A defense is an "affirmative defense" for purposes of Rule 8(c) if it does not controvert the plaintiff's proof. *Brunswick Leasing Co. v. Wisconsin Central Ltd,* 136 F.3d 521, 530 (7th Cir. 1998). Preemption is just such a defense — *a* legal challenge, rather than a factual challenge to plaintiffs' case.

"The pertinence of a particular defense may only become apparent after discovery, for example, in which case it would be reasonable for the court to permit the belated assertion of that defense." *Venters,* 123 F.3d at 967. "The appropriate thing for the defendant to do, of course is to promptly seek the court's leave to amend his answer. *Id.* 123 F.3d at 968.

A review of the record reveals that defendant's answer includes the following affirmative defense: "The Complaint fails to state a claim upon which relief can be granted against MCI." (Doc. 20, pp. 3-4 ("Second Additional Defense")). The blanket affirmative defense asserted in defendant's answer, coupled with the fact that defendant could not have raised the preemption defense prior to learning the exact nature of plaintiffs' alternative design, and the fact that plaintiff has been given an opportunity to fully brief the preemption issue, combine to sati$_{sfy}$ the purpose of Fed.R.Civ.P. 8(c). Therefore, the Court declines to find that defendant waived the affirmative defense of preemption.

The Safety Act and Occupant Crash Protction

The stated purpose of the National Traffic and Motor Vehicle Safety Act ("Safety Act") is "to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101 (formerly 15 U.S.C. § 1381). Accordingly, the Secretary of Transportation has been delegated the authority to establish federal motor ve-

hicle safety standards ("FMVSS" or "Standard") that "shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms." 49 U.S.C. § 30111(a) (formerly 15 U.S.C. § 1392). The Secretary in turn has delegated this duty to the National Highway Transportation Safety Administration ("NHTSA"). 49 C.F.R. § 1.50; *see also* 49 C.F.R. § 501.2.

Occupant crash protection standards specifying performance requirements for the protection of vehicle occupants in crashes are set forth in FMVSS 208 (49 C.F.R. § 571.208). The stated purpose of this standard "is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems." 49 C.F.R. § 571.208, S2.

Safety Standards 4.4.3 and 4.4.3.1 provide that buses manufactured on or after September 1, 1991, with a gross vehicle weight rating of more than 10,000 pounds, "shall comply with the requirements S4.4.2.1 or S4.4.2.2." 49 C.F.R. § 571.208, S4.4.3 and S4.4.3.1. Those requirements are:

> S4.4.2.1 First option — complete passenger protection system — driver only. The vehicle shall meet the crash protection requirements of SS, with respect to an anthropomorphic test dummy in the driver's designated seating position, by means that require no action by vehicle occupants.
>
> S4.4.2.2 Second option — belt system — driver only. The vehicle shall, at the driver's designated seating position, have either a Type 1 or a Type 2 seat belt

> assembly that conforms to S571.209 of this part and S7.2 of this Standard.

49 C.F.R. § 571.208, S4.4.2.1 and S4.4.2.2 (explicit technical requirements have been omitted). The following explanatory note is included in Safety Standard 208 and clarifies the meaning of S4.4.2.1:

> The concept of an occupant protection system which requires "no; action by vehicle occupants" as that term is used in Standard No. 208, is intended to designate a system which will perform its protective restraining function after a normal process of ingress or egress without separate deliberate actions by the vehicle occupant to deploy the restraint system. Thus, the agency considers an occupant protection system to be automatic if an occupant has to take no action to deploy the system but would normally slightly push the seat belt webbing aside when entering or exiting the vehicle or would normally make a slight adjustment in the webbing for comfort.

49 C.F.R. § 571.208, S208 Note.

The Safety Act's Preemption Clause

The preemption clause of the Safety Act states: "When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. . . . 49 U.S.C. § 30103(b)(1) (formerly 15 U.S.C. § 1392(d)). Defendant construes Safety Standard 208 as specifically exempting any requirement that a bus (the MC-12) be required to have air bags.

The Safety Act also contains a savings clause which provides that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C § 30103(e) (formerly 15 U.S.C. § 1397(k)). Noting that Safety Standard 208 does not specifically address air bags, plaintiffs argue that their common law claim can be maintained pursuant to the savings clause — meaning that MCI should be liable for not going above and beyond the requirements of Standard 208, when a feasible alternative design was available.

There appears to be no dispute that air bags are not *required* passive restraint devices. The legislative history supports this conclusion: "Congress and the NHTSA sought to ensure the minimum protection of occupants while allowing manufacturers to develop better systems through competition in the automobile industry. *See* S.REP. No. 1301, 89th Cong., 2d Sess. 1, 4 (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2712." *Perry v. Mercedes Benz of North America,* 957 F.2d 1257, 1260 (5th Cir. 1992); *see also Pokorny v. Ford Motor Co.* 902 F.2d 1116, 1118 FN2, and 1123-1124; see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 34-38 (1983) (detailing the legislative history of passive restraints, through 1982).

"The Supreme Court has held that 'a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate.'" *Gracia,* 112 F.3d at 296 (quoting *Arkansas Electric Co-op. Corp. v. Arkansas Public Service Commission* 461 U.S. 375, 384 (1983)); *see also Freightliner Corp. v. Myrick,* 514 U.S. 280, 286-288 (1995). This is just such a case. The afore-

mentioned legislative history reveals that an affirmative decision was made not to require air bags and to allow manufactures to choose between the stated design options in order to meet the *minimum* standard for motor vehicle equipment performance. *See* 49 U.S.C. § 30102(a)(9) (formerly 15 U.S.C. § 1391(2) (defining the Safety Standards as "minimums"); *see also Gracia v. Volvo Europa Truck, N.V.,* 112 F.3d 291, 296 (7th Cir. 1997). In addition, the Courts of Appeal for the Third, Ninth and Eleventh Circuits have soundly concluded that when Congress specifically gives manufacturers a choice, common law claims that the available option selected by the manufacturer is an inherently defective design are preempted. *See Pokorny v. Ford Motor Co.,* 902 F.2d 1116, 112.3 (3rd Cir. 1990); *Harris v. Ford Motor Co.,* 110 F.3d 1410,1114-1115 (9th Cir. 1997); and *Irving v. Mazda Motor Corp.,* 136 F.3d 764, 768 (11th Cir. 1998).

A judgment in this case that the MC-12 was defectively designed because no air bag was included would have the same effect as a state statute or regulation, for purposes of preemption analysis. *See Gracia,* 112 F.3d at 297; *see also Harris,* 110 F.3d at 1415. Therefore, insofar as plaintiff's design requires air bags to be installed in the MC-12 bus, that 'common law claim is preempted.

This is not to say that compliance with any Safety Standard exempts a manufacturer from all common law liability. *See Gracia,* 112 F.3d at 297-298. Common law claims are "preserved only when they do not deviate from the standards set forth by the NHTSA." *Id* at 298. "Accordingly, a manufacturer who complied with all of the safety standards could still be sued under the common law for a defect that was not discussed or covered by the safety standards. *Id.* at 293 FN8. For example, if

plaintiff argued that the addition of a protective cage, alone, would have been a feasible alternative design that would have prevented plaintiff Frederick Hurley's injuries, then that common law claim probably would not have been preempted. However, the fatal flaw in the plaintiffs' case is that both of their experts, Kelsey and Nelson, adamantly state that the cage, air bag, a three-point shoulder harness/seat belt system, and a knee bolster comprise *a* unitary design, each part being necessary for the success of the whole. (Doc. 155, pp. 3-5; Doc. 151, Exhibit B (Affidavit of H. Boulter Kelsey, Jr., ¶¶ 6, 7 and 11), Exhibit C (Affidavit of William N. Nelson ¶ 9), and Exhibit D (Deposition of H. Boulter Kelsey, Jr., p. 125); *see also* Doc. 148, Exhibit E (January 25, 1996, Deposition of H. Boulter Kelsey, Jr., pp. 217-218, and 265), and Exhibit G (July 8, 1997, Deposition of H. Boulter Kelsey, Jr., p. 50), and Exhibit H (July 10, 1997, Deposition of William Nathan Nelson, pp. 43-44, and 48)). Consequently, if MCI cannot be compelled to include an air bag, the Court need not analyze the viability of the remaining elements of the proffered alternative design, or the *Daubert* issues raised by defendant.

Plaintiffs' attempt to analogize this case to *Grant v. Motor Coach Industries, Inc., Industries, Inc.*, 95-CV-2508-PHX-RGS, which is apparently pending in the District of Arizona, is counter productive. (*See* Doc. 211). The order denying MCI summary judgment in that case was premised on a different expert, and a proffered design alternative that was not subject to preemption. (*See* Doc. 211).

Loss of Consortium Claim

A claim for loss of consortium is predicated on the claim of the directly injured spouse. *Plocar v. Dunkin'*

Donuts of America, Inc., 431 N.E.2d 1175 (Ill.App. 1st Dist. 1981). Consequently, since Frederick Hurley's claim has failed, Christine Hurley's claim must also fail.

IT IS THEREFORE ORDERED that, for the aforestated reasons, plaintiffs Frederick and Christine Hurley's motion to strike defendant's affirmative defense of preemption (Doc. 201) is DENIED.

IT IS FURTHER ORDERED that, for the aforestated reasons, defendant Motor Coach Industries' motion for summary judgment (Doc. 147) is GRANTED, thereby warranting entry of final judgment in this case.

IT IS THEREFORE FURTHER ORDERED that judgment shall enter in favor of defendant Motor Coach Industries, Inc., and against plaintiffs Frederick A. Hurley and Christine A. Hurley, in all respects; judgment shall also reflect the previous orders of Court dismissing all of the plaintiffs' claims against defendants Consolidated Freightways, Road Systems, Inc., Pines Trailer Corp., and Robert Welty; judgment shall also reflect the Court's previous dismissal of all third-party claims between Road Systems, Inc., and Greyhound Lines, Inc., and between Robert Welty and Greyhound Lines, Inc., and between Consolidated Freightways and Greyhound Lines, Inc., and between Motor Coach Industries, Inc., and Greyhound Lines, Inc.; judgment shall also reflect the Court's previous dismissal of the cross-claim between Greyhound Lines, Inc., and Consolidated Freightways and Robert Welty.

IT IS SO ORDERED.

DATED: September 29, 1998

/s/ Clifford J. Proud
CLIFFORD J. PROUD
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

NO. 95-169-CJP

Frederick A. Hurley and Christine A. Hurley,
Plaintiffs,

-vs-

Motor Coach Industries, Inc.,
Consolidated Freightways, Road Systems, Inc.,
Pines Trailer Corporation, and Robert Welty,
Defendants,

Road Systems, Inc., Robert Welty,
Consolidated Freightways and
Motor Coach Industries, Inc.,
Third-party plaintiffs,

-vs-

Greyhound Lines, Inc.,
Third-party defendant,

Greyhound Lines, Inc.,
Cross-claimant,

-vs-

Consolidated Freightways and Robert Welty,
Cross-defendant.

JUDGMENT IN A CIVIL CASE

[Filed: October 1, 1998]

The defendant PINES TRAILER CORPORATION was dismissed on June 14,1995) by and Order entered by United States Magistrate Judge Gerald B. Cohn. Third-party plaintiffs ROAD SYSTEMS, INC., ROBERT WELTY CONSOLIDATED FREIGHTWAYS and MO-

TOR COACH INDUSTRIES, INC.; and third-party defendant GREYHOUND LINES, INC.; cross-claimant GREYHOUND LINES, INC., and cross-defendants CONSOLIDATED FREIGHTWAYS and ROBERT WELTY were dismissed on August 8, 1996, by stipulation of the parties, (Docs. *99* and 100). Defendants CONSOLIDATED FREIGHTWAYS, ROAD SYSTEMS, INC., PINES TRAILER CORPORATION and ROBERT WELTY were dismissed on September 24, 1998, by an Order entered by United States Magistrate Judge Clifford J. Proud (Doc. 216).

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendant MOTOR COACH INDUSTRIES and against plaintiffs FREDERICK A. HURLEY and CHRISTINE A. HURLEY in accordance with an Order entered by United States Magistrate Judge Clifford J. Proud on September 30, 1998, (Doc. 218).

DATED this 1st day of October, 1998

NORBERT G.
JAWORSKI, CLERK

BY: /s/ illegible
Deputy Clerk

Approved by /s/ Clifford J. Proud
United States Magistrate Judge
Clifford J. Proud

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3888

FREDERICK A. HURLEY and
CHRISTINE A. HURLEY,
Plaintiffs/Appellants,

vs.

MOTOR COACH INDUSTRIES,
Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST, ST. LOUIS DIVISION
HON. CLIFFORD J. PROUD, MAGISTRATE

APPELLANTS' PETITION FOR REHEARING AND ALTERNATIVE PETITION FOR REHEARING EN BANC

Respectfully submitted,

THOMAS C. DEVOTO, P.C.

By: Thomas C. DeVoto
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PLAINTIFFS/APPELLANTS
CERTIFICATE OF INTEREST

The undersigned attorney for Plaintiffs/Appellants Frederick A. and Christine A. Hurley hereby supplies the following list in compliance with local rule 26.1:

1. Appellants are Frederick A. Hurley and Christine A. Hurley, and

2. Neither appellants are Amicus nor corporate parties, and

3. The names of the law firms that have appeared for them all are as follows:

   Wuestling, James & DeVoto by Thomas C. DeVoto and Robert L. DeVoto

   And

   THOMAS C. DEVOTO, P. C. by Thomas C. DeVoto and Robert L. DeVoto

TABLE OF CASES AND AUTHORITIES CITED

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JURISDICTIONAL STATEMENT AND STATEMENT OF ISSUES PRESENTED FOR REHEARING

This motion is filed in accordance with rules 35 (b) and 40 of the federal rules of appellate procedure. The grounds for rehearing are as follows:

I.

THE PANEL DECISION CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS.

A.) The decision is in conflict with express rulings of the Supreme Court in

1. *Freightliner vs. Myrick,* 514 U.S. 280,, 115 S. Ct. 1483 (1995) and

2. *Geier vs. America Honda Motor Co.,* 120 S. Ct. 1913 (2000)

II.

THE PROCEEDING BEFORE THIS COURT INVOLVES ONE OR MORE QUESTIONS OF EXCEPTIONAL IMPORTANCE THAT RELATES TO AN ENTIRE CLASS OF PERSONAL INJURY LAWSUITS AND THE PANEL DECISION CONFLICTS WITH AUTHORITATIVE DECISIONS OF THIS COURT AND TWO OTHER UNITED STATES COURTS OF APPEALS THAT HAVE ADDRESSED THE ISSUES.

A.) The panel decision conflicts with two previous opinions issued by this court:

1. *DePaepe vs. General Motors Corp., 141* F.3d 715 (719-720) (7th Cir. 1997) (Illinois) and

2. *Gracia vs. Volvo Europa Truck*, 112 F.3d 291 (7th Cir. 1997)

B.) The panel decision conflicts with the decision of the United States Court of Appeals for the Fifth Circuit and Tenth Circuits:

1. *Choate vs. Champion Home Builders Company*, 2000 WL 1022251, page 3 (10th Cir. (Okla.) (This case was decided on July 25, 2000, the same day as *Hurley -v- MCI* but with the exact opposite result)

2. *Perry vs. Mercedes-Benz of North America, Inc.*, 957 F.2d 1257, 1266-68 (5th Cir. 1992)

ARGUMENT

The panel decision conflicts with decisions of the Supreme Court and with authoritative opinions of this Court and the United States Courts of Appeals for the 5th and 10th Circuits.

It is difficult for anyone to grasp the exact rule of law with regard to federal preemption because the Supreme Court has been somewhat inconsistent depending upon the subject matter of the alleged preempted area, i.e. cigarette warnings, medical devices, motor vehicles, and railroad crossings. Likewise, The Court's opinion in *Geier*, supra, is in stark contrast to the new federalism exhibited by the Court in deference to states' rights. However,

the primary difficulty with any in depth analysis of any of these cases reveals that often the Record on Appeal arose out of a *summary* vs. *plenary proceeding*.[1] Every time an appellate Court passes judgment on an entire class of cases without all of the facts, the court potentially issues an uninformed ruling which will mushroom at an alarming rate as the rulings are passed from court to court, summary judgment to summary judgment.[2] An analysis of the facts is necessary before an analysis of the law makes any sense in a given circumstance. While this court has some of the facts that relate to the accident in

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[1] For example, the panel decision discusses at length the jurisdiction of the District Court. The Court did not have the benefit of the entire record and therefore was unable to determine why plaintiffs/appellants chose not to object to the District Court's jurisdiction. For example, immediately after the removal, a summary judgment motion was filed on behalf of Pines Trailer Corp. The basis of that motion were verified documents establishing that the trailer was manufactured by Road Systems and not Pines Trailer. Plaintiffs/Appellants had assumed that Pines was a proper party defendant because a Pines trailer was photographed by defendant Consolidated-Freightways' expert during an accident reconstruction. The expert filed an affidavit stating it was an error. At this point plaintiffs/appellants filed a memo consenting to the entry of the summary judgment in favor of defendant Pines Trailer Corp. This constituted a voluntary dismissal and the case would have been removable at that time in any event. Counsel for plaintiffs/appellants also understood that the District Court had concurrent jurisdiction and it would have been pointless to argue the merits of counsel's "honest beliefs" when it was apparent that they were "honestly" wrong. With the consent of the client the decision was made to go quietly and not create a non-issue that could have been the subject of an appeal at a later time. Furthermore, this seemed not only to be the prudent and expedient choice but the honorable thing to do as well.

[2] Look at this Court's recent reversal of two Summary cases based upon erroneous application of *Daubert*.

question, the record is woefully inadequate particularly as it relates to the defendant/appellee's affirmative defense based upon compliance with a single design standard of the entire regulatory code. They put in the seat belt. They did nothing more and they could accomplish no less because there was nothing less to do other than not put in any type of passive restraint. There is absolutely no evidence that the defendant/appellee ever tested this vehicle to determine whether or not it complies with the performance aspects of the FMVSS. On the contrary, as will be pointed out herein and as was established in our brief, there is evidence that defendant/appellee **never tested this vehicle**. They have pleaded that they met the requirements of FMVSS #208. Rule 12(b) of the FRCP establishes that this is an affirmative defense. The only proof to support that affirmative defense is the installation of the manual, self-adjusting, "Type 1" lap belt. Once again, they have done nothing more and they could not have done anything less.

The defendant's reliance on the FMVSS requires proof that they met the entire standard and not simply the threshold factual analysis that they installed a single piece of equipment "authorized" by the regulatory scheme. The FMVSS cannot be react piecemeal. The regulations regarding "crashworthiness"[3] must be read in their en-

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[3] There is no definition of crashworthiness in the standard. However, at the National Highway and Traffic Safety Administration's Web page there is a definition of "crashworthiness" in the area referred to as "research and development". It describes crashworthiness as the "use of **occupant restraint** systems and changes to the **vehicle** structures to minimize the severity of occupant injuries" (Exhibit 1). In so doing, NHTSA acknowledges the relationship between vehicle structure and the passenger restraint system. Meeting the design standard of the one without consideration of the other would (sic) futile and foolish.

tirety and certainly together as they relate to the *scope and purpose* of the standards to wit:

> S1. *Scope*. This standard specifies ***performance requirements*** (emphasis added x 3 [bold, italics, & underlined]) for the protection of vehicle occupants in crashes.
>
> S2. *Purpose*. The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured upon anthropomorphic dummies in test crashes, and by specific (sic) the specifying (sic) equipment requirements for active and passive restraint systems.

All four judges that have addressed this issue have obviously concluded that any equipment that is specified and installed has presumably been tested and it must have met the "performance requirements" of the FMVSS. But is this true? Where is the proof? In the absence of either testing or proof of "performance" every judge who has looked at this case is necessarily ruling upon a statutory affirmative defense that is unequivocally a holographic image that owes its existence to nothing more than regulatory "smoke and mirrors".

Furthermore, despite our best efforts, we have been unsuccessful in our attempts to get the Courts to consider the undisputed fact that no definitions of "crashworthiness" can be found in the standards. Similarly, there are no standards for the complete construction of the passenger-driver compartment of the vehicles gov-

erned by this regulatory scheme.[4] We have been unable to convince any of the four judges that have looked at this matter that the absence of any such definition is critical to the analysis because it requires the Court to look to other "standards" in the regulatory scheme and in particular S5 & S6 relating to "crash protection requirements" and "injury criteria" to determine "crashworthiness" ***performance***. For example on page 10 of the opinion, Judge Wood, writing on behalf of the panel, states,

> "the ability to withstand high profile impacts is one aspect of the general topic of crashworthiness that the FMVSS 208 addresses[5]. Otherwise, the option that both *Geier* and *Gracia* preserve for manufacturers would be of eviscerated by the particulars of the crashworthiness in question ***if a vehicle meets the crashworthiness standards of FMVSS 208.***". (emphasis added)

The record before this court does not contain a single scintilla of evidence that this vehicle meets "the crashworthiness standards of FMVSS No. 208" as suggested by the panel decision. Assuming, arguendo, that FMVSS 208 applies to "crashworthiness" as suggested by its title and assuming further that its purpose and scope must necessarily relate to that definition, then "crashworthiness" must be defined in terms of performance standards to prevent injuries. Therefore, the true "crashworthiness" standards are set out in S5 & S6 of standard 208.

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[4] When this case is tried there will be evidence that auto manufacturers use passenger compartment cages in their small and mid size cars presumably because the passenger restraint and injury criteria cannot be met unless there is a marriage of passenger restraint and structural performance.

[5] Where does the standard address the issue of high profile impacts?

Those standards are silent as to the construction of the vehicle structure. There is absolutely no evidence that the defendant/appellee met or exceeded those standards in anyway, shape, or form. There is only one piece of evidence before this court. The evidence that the defendant chose to meet the equipment requirements (design requirements) with the most cost effective (cheap) equipment option available to them. Sometimes it is best to observe a phenomenon from the opposite viewpoint. If this bus had been delivered without any type of passive restraint equipment specified in FMVSS No. 208 and this same collision occurred, should the plaintiff be granted a summary judgment and go to the jury on damages only or should the trial court require the plaintiff to prove that the presence of the seat belt would have met the performance aspects of the standard or, more simply stated, that it would have made a difference?

Fortunately, this court need look no further than its own decision in *DePaepe vs. General Motors Corp.*, 141 F.3d 715, 718 (7th Cir. 1998). Briefly, in that case the plaintiff pleaded that the failure of General Motors to put a padded visor in Its car in violation of FMVSS No. 201 was substantially all that the plaintiff was required to prove in order to retain a substantial verdict. This court held unequivocally that the presence or absence of a design standard feature does not address the more critical issue of performance. The panel decision is in direct conflict with the holding of this Court on the issue of the necessity to prove the performance or a lack of performance as part of a **claim** and therefore **presumably of a defense**. It would be fundamentally unfair to require the plaintiff in an automotive product liability case to prove lack of performance when a design standard has not been met by the manufacture and yet require no proof on the part of the manufacturer that met a design

standard that they also met the requisite performance standard.

Likewise, the United States Court of Appeals for the Fifth Circuit has clearly issued an authoritative opinion that discusses the issue of design vs. performance. *Perry vs. Mercedes-Benz of North America, Inc.*, 957 F.2d 1257, 1266-68 (5th Cir. 1992). The Fifth Circuit ruling is actually in keeping with the ruling and *Geier*, supra. In its opinion the Fifth Circuit states that even if the design theoretically met minimal performance standards, the manufacturer could still be sued because the driver was injured in a collision wherein the forces were well within those forces that the standard was attempting to eliminate, i.e. it didn't work.[6] Unlike *Geier* and unlike the panel decision herein, the facts of the accident are clearly enumerated in the Fifth Circuit's opinion. The plaintiff's argument was that the speed of her car at impact was in excess of the trigger speed enumerated in the FMVSS and that the air bag should have deployed but it failed to do so. Also, the argument clearly related to a collision in an earthen ditch versus a concrete barrier collision which is, of course, the subject matter of FMVSS No. 208. The Court in *Perry* obviously assumed that Mercedes-Benz met both the design and the performance standards of section 208. Notably, however, the opinion is silent on the issue of whether or not Mercedes-Benz

[6] In Perry, supra, the plaintiff drove into a ditch at the end of a "T intersection and received substantial injuries to her teeth and mouth.. She claimed she was traveling between 40-50 mph at impact and Mercedes had "expert" and eyewitness evidence that she was traveling between 10-20 mph. Not coincidentally, the trigger speed for the mechanism was 15 mph. She was not wearing a seat belt. The air bag failed to deploy. In *Hurley* the parties agree as to the speed and more importantly the delta V of the bus whereas the parties in *Perry* disputed the accident speed as the time of impact.

introduced evidence that they had tested and met the performance standards. Clearly, there was evidence that they had met the design standards.[7]

The Supreme Court in *Geier,* supra, specifically addresses the issue of design compliance versus performance compliance. It is respectfully submitted that the panel decision has failed to direct its attention to the Supreme Court's analysis of this critical distinction. Early in his opinion Justice Breyer makes reference to the Amicus brief of the United States. Justice Breyer uses FMVSS No. 105 (1999) to illustrate his analysis. Section 105 sets forth requirements for braking distances. Only certain vehicles are required to have antilock brakes. However, if a vehicle fails to perform to the minimal performance standards, i.e. braking distance, an argument that the vehicle should have been equipped with antilock breaks **would not be preempted as a matter of law.** (*Id.* 1918)

At the time of oral argument, Judge Wood inquired of counsel as to whether or not Plaintiffs/Appellants believed that the Supreme Court would look at the facts of any particular collision as part of their decision-making process as those facts might relate to the FMVSS. The undersigned responded "unfortunately, probably not." ***I was wrong!*** The Supreme Court has specifically stated that an analysis of the collision facts as they relate to

[7] How many members of this court have purchased new toilets that come with the newly regulated 1.6 gallon tank which is designed to save water? How many members of this court have had to flush their toilets two and three times to accomplish what the old 2.5 gallon tanks used to accomplish in a single flush. The new tank meets the design standard but when it doesn't perform it uses more water than the old. Nothing has been accomplished and in fact the situation is made worse despite the compliance with the design feature!

performance is obligatory in the final analysis. As indicated previously, the opinion of the Supreme Court is silent on the issue of testing by American Honda. This court, on the other hand, is blessed with the established fact that the defendant/appellee have testified under oath that they **never tested the front of this vehicle in a barrier collision to determine whether or not it met the standards set forth in S5 or S6 of FMVSS No. 208** (Appellants Appendix p. 79)[8] (attached hereto for the Court's convenience)

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[8] When this case is tried it will be established that this is one of those wonderful half truths that this defendant has hidden behind throughout the course of discovery in these proceedings. For example, MCI denied that it had any engineering drawings for the MC-12 which is the model involved in this collision. It was designed and built largely with the drawings for its predecessor model the MC-9. Therefore it was "true" that there were no specific drawings labeled MC-12. Judge Proud found them guilty of bad faith and reopened discovery. Likewise it is true that MCI never did a barrier test on this bus. In 1999, long after Judge Proud's order and the docketing of this appeal, plaintiffs/appellants counsel came into possession of documents that establish that some testing had in fact taken place. The whole truth and nothing but the truth would have included the fact that MCI purchased the bus manufacturing division of General Motors and that GM *did* perform a barrier test with anthropomorphic dummies but at only 25 miles per hour. The front of the bus collapsed and the driver (dummy) sustained crushing injuries to his lower extremities, his chest smashed the steering wheel and it sustained a severe head injury which is visible by reason of the divots in forehead of the driver (dummy). *Barrier Collision and Related Impact Sled Test on Buses in Intercity Service* 1965. Plaintiffs/Appellants have also obtained a copy of the video that was generated at the time of the barrier crash and both the video and report are available if the Court wishes to review the same. In 1987 Greyhound Corp. the parent corporation of MCI purchased the remnants of the GM bus manufacturing business including its engineering staff who subsequently worked on MCI coaches. *Modern Intercity Coaches,* by Larry Plachno, 1997 pp. 37-39.

On July 25th, 2000 (the same day that this court decided *Hurley)* the 10th Circuit reached the exact opposite conclusion on a preemption case and in so doing actually reached the same conclusion as the Fifth Circuit in *Perry,* supra. *Choate vs. Champion Home Builders Company*, 2000 WL 1022251, page 3 & 5 (10th Cir. (Okla.). That case involved a claimed preemption under the Manufactured Housing Act and regulations promulgated thereunder by the Department of Housing and Urban Development (HUD). The 10th Circuit concluded that the Plaintiffs' claim was preserved because it "seeks to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a Floor. *Geier,* at 119". Applied to the facts of the *Hurley* case, S5 and S6 of the FMVSS set the "minimum floor" and the Hurley alternative design simply seeks to establish greater safety than minimum safety achieved by a federal regulation intended to provide a floor. This, of course, presupposes that the defendant met "the floor" in the first instance which is a highly debatable supposition at best.

Justice Breyer's opinion is consistent with the opinion of Justice Thomas in *Freightliner v. Myrick*, supra, at 289, wherein the court specifically states that when an area is unregulated there can be no preemption There are absolutely no regulations, anywhere in FMVSS 208, that plaintiffs/appellants have been able to locate that set forth the design standards for the driver's compartment of a "forward control" vehicle. There is no dispute that the vehicle in question is a "forward control" vehicle as defined in FMVSS No. 3.[9] It is an unregulated area

[9] Forward controlled means a configuration in which more than half of the engine length is rear-ward of the foremost point of the windshield base and the steering wheel of it is in the forward quarter of the vehicle length. 49 CFR 571.3.

and therefore any attempts to argue a change in the design that would help meet the standard as it relates to the prevention of injuries and death and "performance" are necessarily not subject to preemption.

The panel decision conflicts with this Court's opinion in *Gracia,* supra, because it misapplies the limited nature of the ruling. Plaintiffs/Appellants believed that the decision of this Court in *Gracia,* supra, was correct but for the wrong reasons. 49 CFR 571.212 which relates to windshields and more importantly how they are to be affixed cannot be read in a vacuum. Section No. 212 of the FMVSS specifically makes reference to glazing standards for the type of glass to be used in the driver's compartment of certain vehicles in order to take advantage of the inherent strength of those types of glass to prevent outside objects from entering the passenger compartment at the time of the barrier collision and to keep the passengers within the outer perimeter of the passenger compartment. The Glazing Standard for penetration protection applied to all vehicles including the Volvo truck.[10] Therefore, the manufacturers of forward control vehicles are exempt from that portion of the standard that relates to passenger retention. In a forward control vehicle such as this bus and the vehicle in the *Gracia,* supra, there is no front of the bus or truck. Also, in a barrier collision the front quarter of a forward control vehicle will obviously be damaged which damage could render the doors unusable. The pop out window is therefore a necessary design feature allowing the driver to egress the vehicle following a collision.[11] Perhaps, the

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[10] 49 CFR 571.205 S3.

[11] 49 CFR 571.205 S5.1.1.5 specifically states that buses must have pop out windows because if the door is damaged in a collision the passengers and driver have no way to exit the vehicle.

best way to analyze *Gracia* is to look at it from a different angle. If the claim in that case was that the plaintiff was badly injured because her lap belt caused severe internal injuries in the collision and the claimed defect was the fact that the vehicle used seat belts and that under certain circumstances it would be safer without them, such a claim would clearly be preempted. What the plaintiff was suggesting in *Gracia* amounted to requiring the manufacturer to eliminate a safety feature (required) by the standard. Perhaps, stated in a better manner, Volvo was exempt from this standard, The case did not involve a question of choice because the standard did not apply to the defendant. Volvo had no choice to make in terms of performance. In *Hurley,* MCI was faced with a choice as to how to meet the performance requirements of the FMVSS. This Court now has the opportunity to establish the rule of law as to what the real issue should be, "did they choose wisely"?

Everyday people on the highways of these of this country are severely injured in motor vehicle collisions. Many of them receive "enhanced injuries" due to either design defects or performance failures of the vehicles in question. Exhibit One, the research and development definition specifically makes reference to the fact that "once the crash is unavoidable, the emphasis is on protecting the occupants of motor vehicles from serious injury or death". The panel decision will eviscerate (to quote from Judge Wood) the ability of injured plaintiffs to prosecute claims arising out of lack of performance. The panel opinion is fundamentally wrong and fundamentally unfair. Not only is this court in danger of throwing out the baby with the bath water, but it is in danger of letting the tub slip through its fingers to further injure the baby when it strikes same.

Many times in my career I have jokingly heard the comment, "don't let the facts interfere with your interpretation of the case". The operative word in the previous sentence is "jokingly". This court is about to go on record that it will not let the facts get in the way of a motor vehicle product liability claim so long as the manufacturer has used equipment that is designated in the design criteria of the FMVSS. Facts relating to whether or not the performance criteria have been met are irrelevant or and therefore, anecdotal. Surely, this is not the result that the panel decision intended? Plaintiffs/Appellants assume that the panel decision does not realize the gravity and the devastatingly destructive nature of such a sweeping statement.

In its opinion, the panel decision makes numerous references to some of the problems that the panel perceives with the Hurleys' alternative design. Those arguments, such as the alleged proclivity of professional drivers not to wear three-point seat belts, the effectiveness of the cage, the cost of the cage vs. its savings, and the presence or absence of increased decelerations[12] upon the driver are all arguments that the defendant has available when this case is tried on the merits.

Lastly, the panel decision makes reference to a so-called "loophole" in the *Geier* decision. The "loophole" relates to an argument that the individual vehicle involved in the collision is so unique that changes are

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[12] We note for the benefit of the Court that the defendant/appellee will have a difficult time establishing this argument because they have never(?) tested the vehicle and presumably do not know what the decelerations were before plaintiffs/appellants tested the cage through a computer analysis! How can one argue that decelerations have been increased or decreased without any data to form a statistical threshold?

necessary to that vehicle and that vehicle only. With all due respect to Justice Breyer and to Judge Wood, such a statement begs the threshold question as to whether or not the entire class of vehicles are inherently dangerous as a group How many of us have made the following statement as part of our parenting experience, "I don't care what everyone else is doing, I only care what you are doing and just because everyone else is doing what you want to do, does not make it right". Plaintiffs/Appellants don't care if every bus manufacturer is presently manufacturing inherently dangerous buses. They only care about the bus that destroyed Mr. Hurley's legs and life and what other manufacturers are doing with regard to the manufacture of their intercity buses is simply not relevant.

Throughout my career it has always been suggested that it is improper to make a personal appeal to the jury or a juror. Presumably, such a prohibition would apply to an appellate court. However, due to the serious nature of the issues before this court, counsel feels compelled to ask the question, "if your child or grandchild came home and told you that he or she was about to become the driver of an intercity bus, would you tell your relative not to worry about any dangers with respect to "crashworthiness" of the glass front because it has a two point seat belt""? More importantly, do members or this court advise their family not to sit in the front of the bus, like I do with my children when they go on school sponsored bus tours, because we both understand and appreciate that the front of the bus is a potential death trap.

CONCLUSION

In the final analysis, this Court is faced with an engineering question and not a legal one. When a defen-

dant such as defendant/appellee MCI request that judges render decisions on engineering questions it is not unlike attorneys requesting a panel of engineers, highly trained and highly educated, to determine the constitutionality of the line-item veto. We members of the legal profession would not want engineers to make a legal determination and likewise we members of the legal profession should leave engineering questions as to performance, in particular, to the engineers.

Mr. and Mrs. Hurley are entitled to present their case to a jury of their peers and to present their engineering arguments as to the lack of performance of the MC-12 vehicle in question and to allow the jury to determine the facts and to apply those facts to the law as instructed by the trial court. The issues raised by the defendant in terms of a factual analysis of the performance of the alternative design vs. the performance or lack thereof of the present design constitute the stuff of which great trials are made. *Please!* Permit the Hurley's to try this case on the merits. If after reviewing the record of a plenary proceeding, the District Court or this Court determines that reasonable minds could not have differed on the performance issues then, and only then, should such a decision be rendered by the Court in favor of either the plaintiff/appellants or the defendant/appellee. A decision based upon a plenary record.

WHEREFORE, plaintiffs appellants respectfully request and petition this court to grant either a Panel Rehearing or in the alternative a Rehearing en Banc, to restore the case to the calendar for re-argument or resubmission, to make a final disposition remanding this matter to the District Court for a trial on the merits and for such other relief and or appropriate order that is just and proper in the premises.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that upon information and leaf, Plaintiffs/appellants petition for re-hearing or re-hearing in bond (sic) is in compliance with Rules 35 and 40 of the Seventh Circuit Court of Appeals.

/s/ Thomas C. DeVoto
Thomas C. DeVoto
Attorney for Plaintiffs/
appellants

CERTIFICATE OF SERVICE

Pursuant to this Court's local rules and the applicable federal rules of appellate procedure, the undersigned hereby certifies that two copies of the foregoing were served upon defendant/appellee by mailing of the same United States postage prepaid to Mr. Peter W. Herzog, One Metropolitan Square, 211 North Broadway, Suite 3600, St. Louis, MO 63102.

/s/ Thomas C. DeVoto
Thomas C. DeVoto
Attorney for Plaintiffs/
appellants

EXHIBIT

NHTSA Research & Development

Crashworthiness

Once a crash is unavoidable, the emphasis is on protecting the occupants of motor vehicles from serious injury and death. The Crashworthiness research program seeks to use occupant restraint systems and changes to the vehicle structures to minimize the severity of occupant injury.

DEPOSITION TRANSCRIPT

DEPOSITION OF: MARK WILKINS

TAKEN BY: MR. T.C. DEVOTO

DEPOSITION DATE: AUGUST 21, 1997

* * *

[87]

Q. Can you tell me, sir, are you aware of any studies — and I will use the word studies — that MCI or MCI Limited or any of the other affiliated corporations had done with respect to dealing with what happens when there is driver compartment intrusion, how to prevent that?

A. How to prevent intrusion?

Q. Yes, sir?

A. No.

Q. Would you agree with me that the bumper and impact loading that is associated with it on the MC12 was designed taking into consideration an impact with essentially an automobile or some similar type of vehicle?

A. Most of the vehicles on the [88] highway are of that type, that height.

Q. It was designed because most of the vehicles on the highway are that height?

A. Yes.

* * *

APPENDIX D

No. 89-46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PATRICIA M. WOOD, ET AL., PETITIONERS,

v.

GENERAL MOTORS CORPORATION,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

STUART M. GERSON
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PHILLIP D. BRADY
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JOHN G. ROBERTS, JR.
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QUESTION PRESENTED

Whether Section 103(d) of the National Traffic and Motor Vehicle Safety Act of 1986, 15 U.S.C. 1392(d), or Federal Motor Vehicle Safety Standard 208 preempts a state common law design defect tort action based on the failure to install an airbag in a motor vehicle.

* * *

3. For the reasons given above, we disagree with the court of appeals' holding that design defect claims are impliedly preempted by Section 103(d). If Section 108(c) preserves those actions, they do not conflict with "Congress's chosen *'method* of increasing automobile safety," Pet. App. 37a, because that method includes common law liability for design defects. Holding manufacturers liable for defects in vehicles designed in compliance with federal standards would frustrate that method only if the Act bestowed on manufacturers an immunity from the incentives that the tort system can provide, and Section 108(c) disproves the existence of any such immunity.

At the same time, Section 108(c) does not preserve all design defect claims. The purpose of the Safety Act "is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. 1381, and the primary method that Congress chose to carry out that purpose was to empower the Secretary to issue motor vehicle performance standards, 15 U.S.C. 1392, 1397. In some cases, holding a manufacturer liable for a design defect could interfere with the Secretary's efforts to achieve the statutory objective. For example, if the Secretary determined that a particular item of equipment must have precise specifications in order to accommodate competing goals (*e.g.*, a headrest that is large enough to protect the driver, but not too large so as to obscure his view), a state court could not hold a manufacturer liable under a design defect theory on the ground that the device was too small (or too large) since the state standard would expressly conflict with federal requirements. Or, if the Secretary directed manufacturers to install only a *specific* passive protection system, a state

court could not hold a manufacturer liable for not using a different system. State tort law would be preempted in such cases since it would be impossible to comply with both federal and state law. Cf. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132,142-143 (1963).

This case does not pose that type of conflict, but it does involve a closely related one. In issuing the current version of FMVSS 208, Secretary Dole rejected a proposal that would have required airbags to be installed in all vehicles, in favor of a rule encouraging manufacturers to offer consumers a variety of passive protection systems. She determined — based on a very substantial history of consumer (and congressional) responses to passive restraint requirements — that diversity would promote motor vehicle safety by helping to ensure public acceptance of passive protection systems,[11] by encourag-

[11] In 1972, DOT adopted a rule requiring an interlock mechanism preventing engine ignition unless manual seat belts were fastened. That rule provoked a strong public reaction, prompting Congress to ban the interlock requirement and impose procedural limitations on DOT's future efforts to require restraints other than seat belts. Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1482 (codified at 15 U.S.C. 1410b(b)). Given the public's adverse reaction to the interlock system, one factor the Secretary considered was the public's willingness to accept various passive restraint technologies. 49 Fed. Reg. at 28,987. See *Pacific Legal Foundation v. DOT,* 593 F.2d 1338, 1345-1346 (D.C. Cir.) (the Secretary must consider public reaction to safety standards in order to determine whether a particular standard is "practicable"), cert. denied, 444 U.S. 830 (1979). The Secretary found that some people were concerned about the operation of an airbag protection system, *ie.*, some people feared that the chemical used to inflate airbags would be hazardous, that airbags would deploy inadvertently and thereby cause injury, or that airbags would not deploy during an accident. 49 Fed. Reg. at 29,001. The Secretary concluded that it would be easier to

(Footnote 11 continued on next page)

ing the development of new and improved technologies,[12] and by enabling the agency to acquire a more extensive data base upon which future regulatory decisions could be made. See 49 Fed. Reg. 28,962, 28,987-28,997, 29,000-29,001 (1984). The Secretary also concluded that an all-airbag requirement would be too costly for consumers, due to replacement costs, and that these cost considerations could lead consumers to decline to replace airbags after they were deployed, which could leave occupants without passive protection. *Id.* at 29,000-29,001.[13] For similar reasons, the Secretary took

(Footnote 11 continued)
overcome these fears if airbags were not required in all vehicles. *Ibid.* Emphasizing the public's need "to become accustomed to the technology and the need for protection," Secretary Dole concluded that "an across-the-board mandate too quickly could engender adverse public reaction." *Id.* at 28,989. Given widespread public concern about the safety and efficacy of airbags, the Secretary concluded that "[i]f air bags were required in all cars, these fears, albeit unfounded, could lead to a backlash affecting the acceptability of air bags, * * * [including a possible] repent of the Interlock

[12] The Secretary determined that experience could show that automatic seatbelts would be used far more frequently than anticipated, and that manufacturers might be able to develop better and more acceptable automatic seatbelt systems. That development may result in automatic seat belts that were as effective at saving lives as airbags, but that did so at a lower cost. The Secretary also concluded that an all-airbag requirement would unnecessarily stifle innovation in occupant protection systems. 49 Fed. Reg. at 29,001.

[13] The Secretary estimated that airbags themselves will cost $320 more per car than manual belts, and that they would increase fuel costs by $39 and insurance costs by $18 over the life of the car. The Secretary also estimated that the replacement cost for a deployed airbag would be $800, which may lead some persons not to have an airbag replaced. The Secretary found that automatic seat-belts, by contrast, would cost only $40, would increase fuel costs by only $11, and would have no post-deployment replacement cost. 49 Fed. Reg. at 28,991, 29,000-29,001.

steps to ensure that manufacturers installed airbags in *some* of their cars. See page 3 notes 4-5, *supra*. Accordingly, a critical feature of FMVSS 208 is the Secretary's policy judgment that safety will best be promoted if manufacturers install *alternative* protection systems in their fleets, rather than one particular system in every vehicle.

That policy is likely to be frustrated if manufacturers are held liable for not installing airbags in their vehicles. The incentive effects of state tort law are likely to be particularly powerful in product liability cases involving deaths or serious injuries, where the damage awards are likely to be large. While we know of no cases that have gone to judgment involving alleged liability for not installing airbags, the damages awarded in other product liability cases against motor vehicle manufacturers have been substantial.[14] If manufacturers are held liable for not installing airbags, the burden of paying sizeable compensatory and punitive damage awards along with [t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," S. Rep. No. 1301, *supra*, at 12, is likely to lead auto makers to install airbags in all cars. That outcome would obviously eliminate the diversity that the Secretary found necessary to promote motor vehicle safety. At the least, holding manufacturers liable for not installing airbags would drastically "interfere[] with the methods by which [FMVSS 208] was designed to reach [its] goal." *International Paper Co. v. Ouellette*, *479* U.S.

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[14] *E.g.*, *Hall v. General Motors Corp.*, 647 F.2d 175 (D.C. Cir. 1980) (affirming judgment of $4.75 million); *Sumnicht v. Toyota, U.S.A., Inc.*, 121 Wis. 2d 338, 360 N.W.2d 2 (1984) (same, $2.35 million); *Grimshaw v. Ford Motor Co.* 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (Ct. App. 1981) (same, more than $6 million).

481, 494 (1987). Under these circumstances, design defect tort actions would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the agency]," *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941), and thus would be preempted by federal law. See *De la Cuesta,* 458 U.S. at 155-159 (regulations issued by the Federal Home Loan Bank Board permitting federal savings and loan associations to include due-on-sale clauses in mortgage contracts preempt contrary state law).

Respondent argues that FMVSS 208 preempts state tort claims because that standard has always allowed manufacturers to use various types of occupant restraints. Br. in Opp. 6-11, 19-20. We disagree with this reasoning. Nothing in the Safety Act or FMVSS 208 confers on car makers a "right" to comply with the federal standards without tort liability, and Section 108(c) proves that Congress did not grant any such immunity. That state tort law may compel an auto maker as a practical matter to choose one of the options authorized by federal law also does not necessarily establish an actual conflict between federal and state law. Federal standards are "minimum standard[s]," 15 U.S.C. 1391(2), permitting manufacturers to use any design that satisfies federal requirements. If any design "permitted" in this sense could not be the subject of a common law design defect claim, manufacturers would obtain by implication what Congress expressly denied them in Section 108(c): immunity from common law liability by complying with minimum federal standards. That result would be contrary to Congress's statutory design, which was to supplant direct state regulation of vehicle design, but to leave the common law intact absent an actual conflict

with federal standards.[15] Thus, the mere fact that manufacturers may comply with federal law by installing one of several types of occupant restraint systems does not mean, standing alone, that a state law tort action seeking to impose liability for failing to install airbags is preempted.

What distinguishes this issue from most is that the Secretary determined not simply to allow either automatic belts or airbags, but that an all airbag rule would *disserve* the *safety* purposes of the Act. She therefore affirmatively sought to encourage manufacturers to use a *variety* of protection systems in their fleets. It is *that* policy of affirmatively encouraging diversity that would be disrupted by tort liability, which therefore would be preempted.[16]

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[15] DOT has long taken that view. In a January 1981 letter by Frank Berndt, Chief Counsel of NHTSA, written to counsel for one of the parties in *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981), DOT stated that, under Section 108(c), compliance with a federal standard is not a defense in a products liability action.

[16] Respondent errs in relying on 15 U.S.C. 1410b, Congress's response to the Secretary's 1972 ignition interlock proposal, as a basis for preemption. Br. in Opp. 5-6, 14-15. 20. Section 1410b required the Secretary to rescind the interlock rule and imposed additional procedural requirements on the Secretary's ability to issue regulations requiring occupant restraints other than seat belts. 15 U.S.C. 1410b(b)-(d). Section 1410b is irrelevant to this case for several reasons. First, it does not purport to modify either Section 103(d) or 108(c), the two sections at issue here. Second, Section 1410b purports to allow Congress to exercise a legislative veto over the Secretary's rule, but such provisions are now null and void. *INS* v. *Chadha*, 463 U.S. 919 (1983). In any event, the Secretary complied with Section 1410b when the 1977 version of FMVSS 208 was adopted, and Section 1410b does not apply to subsequent amendments to that standard. 15 U.S.C. 1410b(b)(3)(C).

Section 108(c) does not require a contrary result. The Court has repeatedly held that a clause preserving state tort remedies should not be interpreted in a manner that would lead the act to "destroy itself." *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). See also, *e.g.*, *Ouellette*, *479* U.S. at 494. Compare *Nader . Allegheny Airlines, Inc.*, 426 U.S. 290, 298-300 (1976). The most analogous decision is *Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). In *Kalo Brick*, the Court held that a carrier could not be held liable under state tort law for abandoning a railroad line when the Interstate Commerce Commission had approved the carrier's application for abandonment and had considered the matters that the plaintiff sought to raise in state court. *Id.* at 325-327. The Court so held even though the Interstate Commerce Act had a savings clause similar to Section 108(c) of the Safety Act. 450 U.S. at 328. That clause, the Court held, did not allow a state court to second-guess the agency's judgment on matters committed to its discretion. *Id.* at 330. The same is true here. The task of issuing regulations that would implement the policies underlying the Safety Act was committed to the agency's care by that statute, cf. *City of New York v. FCC*, 486 U.S. at 63-64, and the state tort liability at issue here would disrupt the policy of encouraging diversity in passive protection systems. Section 108(c) does not preserve tort claims that would obstruct that or any other purpose of federal law.

4. Despite our disagreement with the approach to the preemption issue taken by the court of appeals, we nevertheless believe that review by this Court is not warranted. Like the First Circuit, the Tenth and Eleventh Circuits and three state appellate courts have ruled that federal law preempts a state law claim that a motor

vehicle manufacturer can be liable for not installing an airbag. *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1980),

* * *

APPENDIX E

No. 94-286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FREIGHTLINER CORPORAATION, PETITIONER,

v.

BEN MYRICK, ET AL.,

NAVISTAR INTERNATIONAL TRANSPORTATION CORP., PETITIONER

v.

JACK LINDSEY, EXECUTOR OF THE ESATE AND SURVIVING SPOUSE OF CRACE C. LINDSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether respondents' state common law tort actions are preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. 30101-30169 (formerly 15 U.S.C. 1381-1431(1988 & Supp. V 1993)), or by Federal Motor Vehicle Safety Standard 121, 49 C.F.R. 571.121.

* * *

Thus, under a straightforward reading of Section 1392(d) and Section 1397(k), taken together, States are preempted from adopting prescriptive safety standards by legislative or administrative action if NHTSA has established a safety standard governing the same aspect of performance. See also 108 Stat. 943 (codifying new preemption provision, 49 U.S.C. 30103 (b), which states that, when a federal standard is in effect, a State may "prescribe or continue in effect" a standard only if identical to the federal standard "prescribed" under the Safety Act). State courts however, are not precluded by those provisions from entering tort judgments in cases raising the claim that a vehicle or item of equipment was defectively designed with respect to that same aspect of performance.[19]

Petitioners argue (Pet. Br. 35-36), however, that a general statutory saving clause must not be read to unravel the legislative purpose embodied in the rest of a

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[19] NHTSA has long taken that view. In a January 8, 1981, letter from Frank Berndt, Chief Counsel of NHTSA, to counsel for one of the parties in *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), cert. denied 450 U.S. 959 (1981), NHTSA slated that, under Section 1397(k), compliance with federal standard does not provide a defense under federal law to a products liability action. On December 26, 1990, NHTSA reiterated its position, in a letter from its Chief Counsel, Paul Jackson Rice, to counsel for one of the parties in *Neilson v. Porsche*, No. 87-87-1121 (D. Idaho) that, "as a general matter, the fact that a motor vehicle complies with applicable federal safety standards neither preempts state law tort actions nor provides a complete defense to such claims." See also U.S. Amicus Br. 15, *Wood v. General Motors Corp.*, No. 89-46. We are providing counsel for the parties with copies of those letters and our brief in *Wood*. We also are lodging copies of the letters with the Clerk of the Court.

federal statute, including its preemption provision. That proposition is not relevant to this case, for two reasons. First, Section 1397(k) is not a general saving clause, but is focused precisely on only one object of possible preemption under the Safety Act, common law liability. This is not a case, therefore, where it is argued that "[a] general 'remedies' saving clause * * * supersede[s] the specific substantive pre-emption provision." *Morales v. Trans World Airlines, Inc.,*, 112 S. Ct. 2031, 2037 (1992). Here, the narrower provision is the saving clause, Section 1397(k), which specifically addresses the interaction of compliance with federal safety standards and liability at common law; that clause controls the more general preemption provision, Section 1892(d)—even if we assume, *arguendo,* that Section 1392(d) otherwise would, in itself preempt a state common law cause of action (see pages 13-14, *supra).*

Second, there is no danger that our reading of Section 1397(k) will "undermine this carefully drawn statute." *Morales,* 112 S. Ct. at 2037. Congress enacted the two sections at the same time and obviously perceived that they could operate harmoniously. Cf. *ibid.* (specific preemption clause at issue in *Morales* was enacted years after general saving provision). Congress enacted Section 1392(d) to assure manufacturers that they would not have to conform their fleets to different and possibly conflicting standards mandated by States and local jurisdictions, At the same time, it is clear that Congress did not elevate uniformity to an absolute value in the Act. For example, Congress provided that mandatory federal safety standards are only "minimum standard(s)," 15 U.S.C. 1391(2), and it interposed no barrier to manufacturers exceeding those standards voluntarily, either nationwide or in particular States.

Admittedly, Section 1397(k), by preserving tort claims against manufacturers who meet federal safety standards, creates some tension within the Safety Act, since the Act also prevents States from directly prescribing safety standards stricter than the standards prescribed by NHTSA. It is therefore possible that a State's judicial system could indirectly impose a common law "standard" of care on a vehicle manufacturer that a state legislature or administrative agency could not impose directly through the promulgation of "safety standards." Congress nevertheless decided to tolerate that tension, in a compromise between the federal interest in uniformity and the States' traditional interest in compensating victims of motor vehicle accidents, an area in which the States have long measured defendants' conduct against standards of care articulated in the common law adjudication of tort claims.

Congress may have believed that any effect that state tort liability might have on manufacturers' decisions to institute safely measures beyond those required by federal law would be less disruptive of the federal interest in uniformity than positive performance standards adopted by state legislatures or administrative agencies; it may also have believed that state tort law should be permitted to impose liability on a particular manufacturer for failure to include a particular safety feature on a particular model, even if a State could not impose a uniform standard applicable to all vehicles sold or operated in the State. In short, Congress could "reasonably determine that incidental regulatory pressure [of tort liability was] acceptable, whereas direct regulatory authority [was] not." *Goodyear Atomic Corp.* v. *Miller,* 486 U.S. 174, 186 (1988), and the courts "can do no less." *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 256 (1984).

B. Respondents' Claims Are Not Impliedly Preempted By Either The Safety Act Or Standard 12)

Petitioners also challenge the court of appeals' holding that respondents' tort claims are not impliedly preempted by either the Safety Act or Standard 121. Although we do not agree with the court of appeals' reasoning, we do agree with its holding.

1. a. Under this Court's settled preemption jurisprudence, state law is preempted "in three circumstances":

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. * * * Second, in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. * * * Finally, state law is preempted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements * * * or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

English v. General Elec. Co., 496 U.S. 72, 78-79 (1990) (citations omitted).

The court of appeals nevertheless believed that, because the Safety Act contains an express preemption provision that it found (on the basis of a presumption and legislative history) to be a "reliable indicium" of Congress's preemptive intent, this Court's decision in *Cipollone* precluded any inquiry into the implied preemption of respondents' claims by the Safety Act or

Standard 121. See Pet. App. 11a. Although there is language in the *Cipollone* opinion supporting the court of appeals' view, see 112 S. Ct. at 2618, we agree with petitioners that the existence of an express preemption provision should not, inn itself preclude all further inquiry into implied preemption, at least insofar as the question is whether state law "actually conflicts with federal law." See *English,* 496 U.S. at 79.

Although Congress, when it enacts a statute, may survey the statute's intended reach and attempt to identify the field in which state authority should or should not be ousted, it is unrealistic to expect that Congress will foresee all the possible ways in which the States might adopt measures in the future that would bear upon the federal scheme. That is particularly true when Congress enacted a statute, like the Safety Act (but unlike the statute at issue in *Cipollone),* that takes effect through administrative action. In the Safety Act, Congress delegated standard-setting authority to the Secretary of Transportation and identified principles governing the exercise of that authority; it did not prescribe any safety standards itself, nor did it review the technical evidence concerning specific areas to be regulated by the Secretary. Thus, Congress could not know exactly how federal law would take shape as a result of the administrative process, and it could not predict whether or how States might adopt conflicting measures in the future.[11]

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[11] The Court of appeals' analysis may have greater force with respect to implied field preemption, i.e., where, even "in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English*, 496 U.S. at 79. In such situations, the "existence of an express pre-emption

(Footnote 11 continued on next page)

While it is often said that the ultimate touchstone of preemption analysis is Congress's intent (*see, e.g., Cipollone,* 112 S. Ct. at 2817; *English,* 496 U.S. at 78-79), conflict preemption arises directly from the operation of the Supremacy Clause (U.S. Const. Art VI, Cl. 2), rather than from a specific intent on the part or Congress to displace state law. Thus "[a] holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility., *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143 (1963). Similarly a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" may be impliedly preempted by a federal statute, even in the absence of any expression of congressional intent to supersede state law-making authority and even if the state law does not fall within the scope of an express preemption provision in the statute. See *Jones v. Rath Packing Co.,* 430 U.S. 519, 540-543 (1977). While implied preemption does require consideration of Congress's intent to the extent of ascertaining the purposes that

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(Footnote 11 continued)

provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines." *Cipollone,* 112 S. Ct. at 2633 (Scalia, J., concurring in the judgment in part and dissenting in part). Implied field preemption rests less on the conclusion that state law actually conflicts with federal law in specific ways than on an inference, from the pervasiveness of the federal regulatory scheme, the need for uniformity, or the inherent federal nature of the subject matter, that Congress must have intended to leave "no room for the States to supplement it." *English,* 496 U.S. at 79. In the case at bar, no claims is made that Congress occupied the field of motor vehicle safety. See, *e.g.*, 15 U.S.C. 1392(d) (States may enforce standards identical to the federal standards).

Congress sought to achieve (and that might be impeded by state law), it does not depend on a specific, affirmative intent by Congress to supersede conflicting state law.

Because Congress enacts laws against the background of the Supremacy Clause, it must be assumed to believe that federal law will prevail in any collision with state law. The reverse presumption adopted by the court of appeals — that Congress's enactment of an express preemption provision indicates that it otherwise intended for state law to prevail — seems especially odd, for preemption provisions are usually intended to give effect to, not to restrict the effect of, the supremacy of federal legislation. Congress is free to allow state law to operate in the place of conflicting federal law, but we agree with petitioners that it should not be presumed to have done so.

This Court did not elaborate in *Cipollone* on what it meant by a "reliable indicium" of congressional intent, and the statement has already become a prolific breeder of litigation as parties attempt to show that an express statutory provision is, or is not, such a reliable indicium. See Pet. App. 18a-19a (collecting cases). The passage in *Cipollone* was derived from two earlier decisions, *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978), and *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 282 (1987) (plurality opinion of Marshall, J.). Neither decision, however, stands for the proposition that an express preemption clause moots inquiry into conflict preemption.

In *Malone*, the issue was essentially one of field preemption: whether a state statute regulating pension plans "trenched on * * * subjects that Congress had committed for determination to the collective-bargain-

ing process." 435 U.S. at 504. The Court noted that the relevant federal statutes did not "expressly foreclos[e] all state regulatory power" with respect to issues that might be the subject of collective bargaining, *ibid.*, and so it observed that any congressional intent to preempt "must be *implied* from the relevant provisions of the * * * statutes," *id.* at 605. The Court was referring, however, to "implying" (or inferring) a congressional intent to oust state law from sources such as other sections of the statutes and their structure and legislative history; it was not referring to "implied" preemption of state laws that actually conflict with federal law. Moreover, the Court found the "reliable indicium" of congressional intent with respect to state authority, not in a preemption clause (which the statutes did not contain), but in a saving provision. *Ibid. Malone* therefore stands only for the proposition that a statute containing a saving clause but not a preemption clause can reliably indicate Congress's intent *not* to require broad preemption of state law.

In *Guerra*, the plurality concluded that the text of the saving provision of Title VII of the Civil Rights Act of 1964 furnished a reliable indicium of congressional intent to *preserve* all state laws *except* those that actually conflict with federal law. The Court accordingly held that there was no need to "infer congressional intent to pre-empt state laws" from other provisions of Title VII. 479 U.S. at 282; see also *id.* at 295 (Scalia, J., concurring in the judgment) (noting that sections relied on by plurality were *"antipre-emption* provisions").

Against this background, we do not believe that *Cipollone* should be read to have announced a general rule that an express preemption clause, by itself, reliably or presumptively indicates an intent by Congress to

tolerate conflicts between state and federal laws.[12] Fed-aws.[12] Federal statutes vary widely in their terms and contexts, ascontexts, as well as the ways in which they interact with state law; state law; that variety cautions against generalizations aboutions about Congress's preemptive intent. We agree with the court ofthe court of appeals that courts should presume that Congress in-ongress intended what it said in a statute's express preemptionpreemption clause. Pet. App. 19a. But courts should also be free tco be free to employ all the traditional tools of construction in deter-on in determining whether state law is preempted with respect tcn respect to matters *not* covered by the express preemption clausesion clause. Thus, the reference in *Cipollone* to whether the preemp-he preemption clause is a "reliable indicium of congressional in-essional intent" should be understood to mean that the traditionaltraditional tools of construction with respect to the latter issueatter issue should include consideration of the express preemptionpreemption clause, but not to the exclusion of other features of theures of the statutory scheme, its legislative history, and actual con-actual conflict between state and federal law.

b. Moreover, implied conflict preemption by federal by federal law is not confined to federal statutes. In this case, it isis case, it is also necessary to determine whether state law is im- law is impliedly preempted by NHTSA's implementation of thetion of the Safety Act through issuance of a particular federal stan-deral standard. Whether or no Congress has enacted a statutorya statutory preemption provision, state laws are impliedly preempted preempted by federal regulations to the extent that they actuallyey actually conflict with those regulations, or stand as an obstacle to obstacle to

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[12] Since *Cipollone*, this Court has undertaken implied preemp-plied preemption analysis even in cases involving an express preemption preemption provision. See CSX, 113 S. Ct. at 1742 n.12; *John Hancock Mut. Lifeock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517, 526 (1993).7, 526 (1993). The same was true prior to *Cipollone*. See, *e.g.*, *Rath Packing*, 43C*Packing*, 430 U.S. at 540, 543.

the accomplishment and execution of the federal regulatory scheme. "The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988); see *Capital Cities Cable, Inc., v. Crisp*, 467 U.S. 691, 706 (1984). Therefore, whatever the force of the court of appeals' reading of *Cipollone* where the only implied preemption claim in that state law conflicts with a federal statute, in a case where, as here, 'a narrow focus on Congress' intent to supersede state law [is] misdirected,' for "[a] preemptive regulation's force does not depend on express congressional authorization to displace state law.'" *City of New York*, 486 U.S. at 64 (citation omitted).

2. a. Although we believe that the court of appeals should not have pretermitted its inquiry into implied preemption, we agree with its ultimate conclusion that respondents' claims are not impliedly preempted. Respondents' tort claims clearly are not impliedly preempted by the Safety Act itself, since nothing in the Act itself regulates the use of ABS devices. Nor would a finding of liability on respondents' claims stand as an obstacle to the full accomplishment of Congress's objectives in enacting the Safety Act. While a state law may be impliedly preempted "if it interferes with the methods by which the federal statute was designed to reach [its] goal," *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987), here, Congress's chosen methods of increasing automotive safety include both the establishment of federal minimum standards and the preservation of common law tort liability on the part of even those manufacturers that comply with those standards.

b. Nor are respondents' claims impliedly preempted by Standard 121. Underlying petitioners' submission to the contrary is a premise with which we fundamentally disagree. Petitioners contend that the Ninth Circuit's decision vacating the stopping distance and stability requirements or Standard 121 as applied to trucks and trailers, or NHTSA's 1979 amendment of the Standard following the court's order, "effectively gave the manufacturers the option [under federal law] of not installing [an ABS] device." Pet. App. 10a; see Pet. Br. 11, 14, 16. Thus, they argue that any state law that forecloses that "option" must be preempted. In fact, neither NHTSA nor the Ninth Circuit determined that ABS devices are inherently unsafe or that the Safety Act requires that a manufacturer have the unfettered option not to install them. Because there has been no such federal determination, a state law claim based on the failure to install an ABS device would not conflict with federal law; the Court need not address how the implied preemption issue might be resolved in a case in which NHTSA had made such a determination.

i. The Ninth Circuit did not affirmatively determine in *Paccar* that ABS devices would present an unreasonable risk to safety. Rather, applying either the "substantial evidence" or arbitrary and capricious" standard of review to NHTSA's rulemaking record, 573 F.2d at 636 (see *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41, 44 (1983)), the Ninth Circuit concluded only that NHTSA had erred by failing to take into account at that time evidence of serious safety problems presented by mass production of ABS devices, and by limiting its review of the evidence to the performance of ABS devices at the manufacturing stage. Thus, while the court set aside the provisions of Standard 121 that would have required installation of ABS devices in

trucks and trailers until NHTSA undertook a more thorough review of the evidence, it did not direct NHTSA to promulgate a standard prohibiting installation of ABS devices or preclude NHTSA from concluding, after further review (or after subsequent technological advances), that ABS devices should be required, either directly or indirectly through the imposition of braking performance criteria.[13] The court made clear that "[t]he agency may, of course, continue to propose new standards, including the promulgation of new stopping distance requirements to replace those here invalidated," and that it held "only that more pro[b]ative and convincing data evidencing the reliability and safety of vehicles that are equipped with [ABS devices] and in use must be available before the agency can enforce a standard requiring [their] installation." 573 F.2d at 643.[14]

ii. NHTSA likewise has never concluded that installation of ABS devices by truck manufacturers would contravene the purposes of the Safety Act, or that manufacturers who choose the "option" of not installing such

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[13] Any such order would have exceeded the proper scope of judicial review. See *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); see also

[14] Even if the Ninth Circuit had made an affirmative determination on the administrative record before it in 1978 that ABS devices presented a sufficient risk to safety that they should not be mandated on a nationwide basis, such a ruling could not preclude a trial court or jury in a private tort suit (presumably brought by plaintiffs who were not parties to the judicial review of NHTSA's standard) from finding that it was unreasonable for an ABS device not to have been installed on a particular vehicle. Nor would it bar the court or jury in such a suit from concluding that technology and other circumstances had sufficiently evolved since 1978 that it had become unreasonable for the manufacturer not to install ABS devices on trucks built in later years.

devices should be protected from the consequences of that choice. The court of appeals' vacatur of Standard 121 left a regulatory gap in the area of stopping distances that NHTSA has not yet filled; the situation therefore is the same as if NHTSA had never instituted rulemaking concerning stopping distances for trucks and trailers, or had done so but never issued any standard. In such a situation, respondents' claims would not be impliedly preempted:

> In [some] cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised. * * * [And] where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation[.] The states are in those cases permitted to use their police power in the interval.

Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 773-774 (1947) (citations omitted).

Petitioners suggest (Pet. Br. 32) that this case is more analogous to one in which the "failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." See *Bethlehem Steel*, 330 U.S. at 774. NHTSA,

however, has not made any such determination about ABS devices in trucks and trailers. To the contrary, NHTSA explained when it amended Standard 121 in 1979 that ABS devices promote safety; it has encouraged manufacturers to install them; and it has given manufacturers guidance as to "reasonable standards for minimum acceptable performance" for ABS devices. 44 Fed. Reg. 46,849 (1979). NHTSA also declined, after the *Paccar* decision, to order the removal of ABS devices from trucks and trailers manufactured to meet Standard 121. 43 Fed. Reg. 48,647 (1978). NHTSA in fact is of the view that "ABS are very effective in providing short stable stops in all operating conditions," 58 Fed. Reg. 11,012 (1993), and it currently estimates that "the use of ABS on all heavy vehicles would help prevent between 379 and 600 fatalities, [and] between 19,825 and 34,517 injuries [annually]," *id.* at 50,754.[15]

NHTSA's support for ABS devices can be contrasted to its findings, in the 1984 version of Standard 208, 49 C.F.R. 571.208, concerning installation of airbags in passenger vehicles. In promulgating that Standard, the Secretary concluded that, because of a history of substantial consumer resistance to automatic, or passive, occupant restraint systems, passenger safety would be best served by a diversity of such restraint systems, including but not limited to airbags, which would promote public acceptance of passive restraints. The Secretary explicitly determined that an all-airbag rule would have disserved the safety purposes of the Act. See 49 Fed. Reg. 29,001 (1984). As we explained in our *amicus curiae* brief in *Wood* v. *General Motors Corp.*, No. 89-46, com-

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[15] The United States takes no position on the merits of respondents' specific claims that petitioners' failure to install ABS devices violated a common law duty of care.

mon law tort actions that imposed liability for failure to install airbags (as opposed to other types of passive restraint devices) could, as a practical matter, have compelled manufacturers to install airbags in all their new vehicles. Because such a result would have frustrated the Secretary's policy judgment and would have had an adverse effect on safety, we argued in *Wood* (U.S. Amicus Br. 11-15) that such suits were preempted.[16] Interference with that federally protected freedom of choice through state tort judgments would have conflicted with Standard 208. Compare *Building & Construction Trades Council v. Associated Builders & Contractors,* 113 S. Ct. 1190,1194-1195 (1993).

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[16] Although the majority of courts to have considered the question have concluded that "no-airbags" suits are preempted, they have done so on a broader theory of implied preemption with which the United States does not agree, *i.e.*, that the existence of "options" to comply with Standard 208 in itself precludes state-court judgments based on the failure to install one particular option. See, (*e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990); *Taylor v. General Motors Corp., supra; Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990). In response to legislation (see NHTSA Authorization Act of 1991, Pub. L. No. 102-240, Tit. II, Pt. B, § 2508, 105 Stat. 2084), NHTSA has recently amended Standard 208 to require that all cars manufactured on or after September 1, 1997, and all light trucks manufactured on or after September 1, 1998, be equipped with airbags in the driver's and front outboard passenger's seats. 58 Fed. Reg. 46,551(1993).

NHTSA has taken no analogous regulatory step through Standard 121 in the area of ABS devices.[17] Indeed, at present there is no federal motor vehicle safety standard in effect at all requiring ABS devices or imposing stopping distances for trucks and trailers that use air brakes. Respondents' tort claims therefore do not conflict with Standard 121. Compliance with both Standard 121 and a state law duty of care requiring installation of ABS devices would not be a physical impossibility, since nothing in Standard 121 prevents manufacturers from installing such devices.[18] Nor would state tort liability stand as an obstacle to the full accomplishment of the purposes of Standard 121, since that Standard does not reflect any determination by NHTSA that installation of ABS devices would be contrary to the safety objectives of the Act. NHTSA has consistently held the view that ABS devices promote passenger safety, even though there is no regulation in effect requiring those devices. Because "the Secretary has [n]either promulgated his own * * * requirement * * * [nor] decided that no such requirement

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[17] NHTSA's construction of Standard 121, including that it confers no federally protected right to choose whether or not to install ABS devices that must in turn be free from the incidental effect of common law tort suits, Is entitled to substantial deference. *Thomas Jefferson University v. Shalala*, 114 S. Ct. 2381, 2386-2387 (1994); *Gardebring v. Jenkins*, 485 U.S. 415, 429-430 (1988).

[18] As we pointed out in *Wood* (U.S. Amicus Br. 11), there may be situations in which it would be impossible for a manufacturer to comply with both a state common law duty of care and a federal standard. If, for example, NHTSA determined that a particular item of equipment must have precise specifications to accommodate competing goals (*e.g.*, a headrest that is large enough to protect the driver but not so large as to obscure his view), a common law duty of care requiring the installation of a larger (or smaller) headrest could directly conflict with the federal requirements and be preempted.

should be imposed at all," *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 171-172 (1978), NHTSA's 1979 amendment of Standard 121 does not preempt respondents' claims.

* * *

APPENDIX F

No. 98-1811

IN THE

Supreme Court of the United States

ALEXIS GEIER, ET AL., PETITIONERS,

v.

AMERICAN HONDA MOTOR COMPANY, INC., ET AL.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether the National Traffic and Moor Vehicle Safety Act of 1966, 15 U.S.C. 1881 *et seq.* (1988), or Federal Motor Vehicle Safety Standard 208, 49 C.F.R. 571.208 (1987), preempts a state common law tort claim that an automobile manufactured in 1987 was defectively designed because it lacked an airbag.

* * *

B. Standard 208 Impliedly Preempts Petitioners' Tort Claims.

State law is impliedly preempted if it is "impossible for a private party to comply with both state and federal requirements * * * or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [federal law].'" *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (citations omitted). Petitioners' tort claims are preempted under that analysis. Holding respondent liable for not installing airbags in petitioners' car would frustrate Standard 208's policy of encouraging a variety of passive restraints.

1. Contrary to petitioners' contention (Br. 2541), the Safety Act's savings clause, 15 U.S.C. 1397(k), does not foreclose implied preemption analysis.

a. As an initial matter, any suggestion (see Pet. Br. 37-38) that the presence of a savings clause automatically precludes implied preemption analysis is incorrect. Savings clauses vary significantly in both phraseology and context, and, as with any other statutory provision, a court must ascertain the meaning of the specific clause. Cf. *Freightliner*, 514 U.S. at 239.[12] Thus, this Court

[12] Petitioners' reliance (Br. 38) on *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), and *California Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), is unpersuasive. In *Malone*, the issue was essentially field preemption, and the Court held that two savings provisions (more broadly worded than the one at issue here) indicated that the federal labor statutes did not foreclose all state regulation of pension plans. 435 U.S. at 504-505. In *Guerra*, the plurality examined the savings provisions in the Civil Rights Act of 1964 and found that "Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law" (479 U.S. at 281); see also *id.* at 295-296 (Scalia, J., concurring).

frequently conducts implied preemption analysis even though a statute contains a savings clause. Indeed, the Court hesitates to read a savings clause to authorize claims that conflict with federal law. See, *e.g.*, *American Telephone & Telegraph Co. (AT&T) v. Central Office Telephone,* 524 U.S. 214, 227-228 (1998); *International Paper Co. v. Ouellette,* 479 U.S. 481, 494 (1987); *Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 828 (1981); *Texas & Pac. Ry. Abilene Cotton Oil Co.,* 204 U.S. 426, 446 (1907).

There is good reason for that approach. Conflict preemption arises directly from the operation of the Supremacy Clause (U.S. Const. Art. VI, Cl. 2), rather than from a specific intent to displace state law. Thus, "[a] holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143 (1963). Similarly, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" may be impliedly preempted by a federal statute, even in the absence of any expression of intent to supersede state law-making authority. See *Jones v. Rath Packing Co.,* 430 U.S. 519, 540-543 (1977). Those implied preemption principles are equally applicable to conflicts between state laws and federal regulations. Whether or not Congress has addressed preemption, "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC,* 486 U.S. 57, 64 (1988).

Because Congress enacts laws against the background of the Supremacy Clause, a court should assume that

Congress believes that federal law (whether enacted directly by Congress or promulgated by a federal agency pursuant to statutory authorization) will prevail in any collision with state law. Of course, Congress is free to change the general rule and to allow state laws to operate in the place of conflicting federal law. But absent a "solid basis" for believing that Congress "intended fundamentally to alter traditional preemption analysis," *John Hancock Mut. Life Ins. Co. . Harris Trust & Sav. Bank,* 510 U.S.. 86, 99 (1993), a statute should not be interpreted to permit state laws to operate in conflict with federal law.[13]

The presumption that Congress does not intend to alter traditional principles of conflict preemption is particularly appropriate when Congress enacts a statute such as the Safety Act that takes effect through administrative action. Congress did not itself prescribe motor vehicle safety standards in the Safety Act. Instead, it delegated their promulgation (and revision in light of experience) to the Secretary of Transportation. Thus, Congress could not know what federal standards would be promulgated, and it could not predict whether or how States might adopt conflicting measures.

b. The Act's savings clause, Section 1397(k), provides no sound basis to conclude that Congress intended to alter the general rule that federal law preempts conflicting state law. Nothing in the text of the clause suggests that common law liability is saved from preemption even if it conflicts with a federal safety standard. Indeed, the language of the clause does not directly address preemption at all. It states that "[c]ompliance with any Federal motor vehicle safety standard issued under [the Safety Act] does not exempt any person from any liability under

common law." 15 U.S.C. (1397(k).[14] As we have explained, the clause thus preserves common law liability in the sense that a manufacturer cannot invoke its compliance with federal law as an automatic defense against a claim that a car was defectively designed. See p. 14, supra. The clause does not, however, preserve common law liability that conflicts with federal law.

The legislative history supports that interpretation. The provision originated in the House of Representatives, and the House Report expressly states that the clause "establishes[] that compliance with safety standards is not to be a *defense* or otherwise to affect the rights of parties under common law." See H.R. Rep. No. 1776, *supra,* at 24 (emphasis added). Other references in the legislative history are consistent with the understanding that Section 1397(k) negates a substantive defense to liability and does not directly address preemption.[15]

[14] The recodification substituted the modifier "a" for "any," note 3, *supra,* , without intending substantive change, note 1, *supra*. The fact that Congress perceived no distinction between the use of the words "a" and "any" refutes the suggestion (see Pet. Br. 25) that the use of "any", was intended to signal a broad construction of the clause.

[15] See, *e.g.*, S. Rep. No. 1301, *supra*, at 12 (explaining that federal standards *"need not* be interpreted as *restricting* State common law standards of care" so that compliance with federal standards "would thus *not necessarily* shield any person from product liability at common law") (emphasis added); 112 Cong. Rec. 14,230 (1966) (Sen. Magnuson) (also using qualifier "not necessarily"); *id.* at 21,487 (Sen. Magnuson) (stating that Senate conferees adopted the House provision, which "makes explicit, in the bill, a principle developed in the Senate report"); *ibid.* (explaining that the provision does not prevent use of compliance or noncompliance as "evidence"); *id.* at 21,490 (Sen. Cotton) ("proof of compliance" may be offered "for such relevance and weight as courts and juries may give it"). Petitioners

(Footnote 15 continued on next page)

Petitioners have not identified, and we have not found, any statement in the legislative history that describes Section 1397(k) as preserving from preemption common law claims that conflict with federal law.[16]

That interpretation of Section 1397(k) is reinforced by the fact that Congress did not include the savings clause in the Section of the Safety Act that addresses preemption (Section 103(d) (codified at 15 U.S.C. 1392(d))) but inserted it five sections later (Section 108(c) (codified at

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(Footnote 15 continued)

also rely (Br. 29) on the comments of a witness at House hearings who expressed the concern that manufacturers would respond to lawsuits with a claim that "Our product meets Government standards." Comments by members of the public reveal little about congressional intent. In any event, the witness's concern was precisely that manufacturers would use compliance with federal standards as a substantive defense to liability.

[16] As noted in the text, the House Report states that "compliance with federal standards is not to be a defense or otherwise to *affect the rights* of parties under common law." H.R. Rep. No. 1776, *supra*, at 24 (emphasis added). The context suggests that the italicized language refers to substantive changes to common law rules rather than the possibility of preemption. Petitioners also note (Br. 29) that Senator Magnuson stated that "[t]he common law on product liability still remains as it was." That statement too is properly understood as explaining that the Act made no change to the substance of product liability law. Finally, petitioners rely (Br. 30-31) on a statement by Representative Dingell that "we have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser." 112 Cong. Rec, at 19,663. Mr. Dingell made that statement to explain why he opposed an amendment that would have criminalized willful violations of federal standards. Thus, the statement indicates only that common law actions based on the violation of federal standards are preserved; it does not indicate that actions that would conflict with federal standards are similarly preserved. See *Wood*, 865 F.2d at 407 n14.

15 U.S.C. 1397(k))). Thus, the structure of the Act confirms that the savings clause was not intended directly to address preemption.[17]

Our interpretation does not render the savings clause meaningless, as petitioners contend (Br. 26-27). Petitioners' argument would have force only if the preemption clause applied to common law claims, a reading that we reject. See *ibid.*; pp. 11-15, *supra*. Instead, our interpretation preserves an important role for Section 1397(k): In cases in which tort liability does not conflict with a federal standard, Section 1397(k) makes clear that compliance with the standard does not immunize a manufacturer from liability. Those cases can arise frequently, since state tort law does not conflict with a federal "minimum standard" (15 U.S.C. 1391(2)) merely because state law imposes a more stringent requirement.[18] For example, Federal Motor Vehicle Safety Standard 105, 49 C.F.R. 571.105, which establishes re-

[17] The recodification included both provisions in 49 U.S.C. 30103 (entitled "Relationship to other laws") but in separate sub-sections, one entitled "Preemption" (49 U.S.C. 30103(b)) and the other entitled "Common law liability" (49 U.S.C. 30103(e)).

[18] We therefore agree with petitioners (Br. 46-47) that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose. We disagree, however, with the contention (Br. 44, 46) that the Secretary provided options because she had no statutory authorization to do otherwise. The Secretary could have imposed performance requirements that effectively required an airbag design. See *Wood*, 865 F.2d at 416-417, 112 Cong. Rec. at 21,487 (Sen. Magnuson) (performance standards expected to affect design). As we explain at pages 23-26, *infra*, the Secretary chose not to do so in order to encourage the provision of a variety of passive restraints, because she determined that would best promote safety. Petitioners' claims are preempted because they would frustrate that policy judgment.

quirements for brake performance, does not require anti-lock brakes in addition to airbrakes in all vehicles, but the Secretary has not determined that requiring anti-lock brakes would disserve safety. Section 1397(k) makes clear that compliance with Standard 105 is not a defense to a common law tort claim that a vehicle is defectively designed because it lacks anti-lock brakes. Federal Motor Vehicle Safety Standard 125, 49 C.F.R. 571.125, provides multiple options for the design of reflective devices to warn approaching traffic of the presence of a stopped vehicle, but the Secretary did not determine that the availability of options was necessary to promote safety. Section 1397(k) makes clear that compliance with Standard 125 is not a defense to a common law tort claim that the reflective device is defectively designed unless it uses one rather than another of those options. Thus, under our reading, Section 1397(k) has a sensible and important role.[19]

C. It is petitioners' reading of the clause as preserving tort claims even if they conflict with federal safety standards that would have anomalous results. The Safety Act's purpose "is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. 1381, and Congress chose to carry out that purpose by empowering the Secretary to issue safety standards, 15 U.S.C. 1392, 1397. In some instances, such as the present case, holding a manufacturer liable for

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[19] Petitioners contend (Br. 27 n.11) that there was no need for Congress to specify that compliance with federal standards is not a defense to common law liability because every State already provided that compliance with a federal regulation is not a defense to a design defect claim. But even if Congress understood that to be the common law rule, it could not be certain that rule would not change. It therefore had ample reason to assure that the Safety Act would not be construed to create a new, automatic federal defense.

what a jury might find to be a design defect would significantly impair the Secretary's efforts to promote safety. Reading the savings clause to preserve that liability from preemption would impermissibly allow courts to second-guess the Secretary's judgment on matters "entrusted to [his] informed discretion" *(Kalo Brick & Tile Co.*, 450 U.S. at 330) and lead the Act "to destroy itself" *(AT&T*, 524 U.S. at 228).

For example, the Secretary has established windshield retention requirements in Federal Motor Vehicle Safety Standard 212, 49 C.F.R. 571.212, in order to prevent occupants from being thrown from their cars in crashes. If manufacturers could be held liable under state tort law on a theory that it is a design defect for windshields in those vehicles to be retained in a crash because passengers could be injured if they struck the windshields, it would be impossible for manufacturers to comply with both the federal standard and the duties imposed by state tort law. Thus, if the tort claims were not preempted, the Secretary would have to rescind the federal standard, or manufacturers would have to continue to produce windshields that do not eject in order to comply with Standard 212, while paying tort judgments based on the theory that the federally mandated failure of the windshields to release in a crash rendered their cars defectively designed. There is no indication that Congress intended that startling result.

2. a. This case does not pose that type of conflict, but it poses a closely related one. In issuing the version of Standard 208 in effect when petitioners' car was manufactured, the Secretary rejected a rule requiring airbags in all cars in favor of a rule encouraging manufacturers to offer a variety of passive restraints. The Secretary determined — based on the history of consumer (and

congressional) responses to passive restraint requirements — that diversity would best promote safety by helping to ensure public acceptance of passive protection systems,[20] encouraging the development of new and improved technologies,[21] and enabling the agency to acquire more data to make regulatory decisions. See 49 Fed. Reg. at 28,987-28,997, 29,000-29,001. The Secretary also determined that the high replacement costs of

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[20] In 1972, the Secretary adopted a rule requiring an interlock mechanism preventing engine ignition unless manual seatbelts were fastened. That rule provoked a strong public reaction, prompting Congress to ban the interlock requirement and impose procedural limitations on the agency's future efforts to require restraints other than seatbelts. Motor Vehicle and School Bus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1482 (codified at 15 U.S.C. 1401(b)(1988)). Given the public's adverse reaction to the interlock system, one factor the Secretary properly considered was the public's willingness to accept various passive restraint technologies. 49 Fed. Reg. at 28,987. See *Pacific Legal Found. v. DOT*, 593 F.2d 1338, 1345-1346 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979). "Airbags engendered the largest quantity of, and most vociferously worded, comments" during the rulemaking. 49 Fed. Reg. at 29,001. Commenters expressed concerns that the chemical used to inflate airbags would be hazardous, that airbags would deploy inadvertently and thereby cause injury, and that airbags would not deploy during an accident. *Ibid*. Given those widespread concerns, the Secretary concluded that "[i]f airbags were required in all cars, these fears, albeit unfounded, could lead to a backlash affecting the acceptability of airbags. This could lead to their being disarmed, or, perhaps, to a repeat of the interlock reaction." *Ibid*.

[21] The Secretary determined that experience could show that automatic seatbelts would be used more frequently than anticipated, and that manufacturers might develop better and more acceptable automatic seatbelt systems. That development could result in automatic seatbelts that were as effective as airbags but cost less. The Secretary also concluded that requiring airbags in all cars would unnecessarily stifle further innovation in occupant protection systems. 49 Fed. Reg. at 29,001.

airbags could cause some consumers to decline to replace them after they were deployed, which would leave occupants without passive protection. *Id.* at 29,000-29,001. At the same time, the Secretary took steps that she reasonably determined would prompt manufacturers to install airbags in *some* of their cars. See p. 5 & n.5, *supra*. Standard 208 thus embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car.

That policy of affirmatively encouraging diversity would be frustrated if manufacturers could be held liable for not installing airbags. If, when the Secretary promulgated the rule in 1984, respondent and other manufacturers had known that they could later be held liable for failure to install airbags, the prospect of sizable compensatory and punitive damage awards, combined with the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," S. Rep. No. 1301, *supra,* at 12, would likely have led them to install airbags in all cars. That outcome would have eliminated the diversity that the Secretary found necessary at that time to promote motor vehicle safety. At the very least, holding manufacturers liable for not installing airbags would have "interfere[d] with the methods by which [Standard 208] was designed to reach [its] goal." *Ouellette,* 479 U.S. at 494.[22] Therefore,

[22] Petitioners mistakenly argue (Br. 16, 44) that their tort claims would not interfere with the Secretary's chosen methods because, they assert (Br. 2, 10-11), the Secretary intended tort liability to provide an incentive for manufacturers to install airbags. In support of that assertion, petitioners cite the Secretary's statement that "potential liability for any deficient systems" would discourage manufacturers from "us[ing] the cheapest system to comply with an

(Footnote 22 continued on next page)

tort claims like petitioners', which are based on the theory that a car (subject to the version of Standard 208 in effect in 1987) was defectively designed because it lacked an airbag, "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [Standard 208]." *Hines v. Davidowitz*, 312 U.S. 52 ,67(1941).

For those reasons, the Secretary has long taken the view that Standard 208 preempts such claims.[23] See U.S. Amicus Br. at 29-29, *Freightliner v. Myrick, supra*; U.S. Amicus Br. at 11-15, *Wood . General Motors Corp., supra*. That view is consistent with this Court's decisions holding that when Congress or an agency determines that certain activity must be permitted in order to further the purposes of federal law, state law that would forbid that behavior is preempted. See, *e.g., Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996); *Fidelity Fed. Sav.*

(Footnote 22 continued)

automatic restraint requirement." 49 Fed. Reg. at 29,000. Petitioners misunderstand the Secretary's statement, which meant that manufacturers could face tort liability if they installed deflective passive restraints. The Secretary did not mean that manufacturers could be held liable for choosing one type of passive restraint rather than another. Petitioners' amici (Missouri Br. 6; Ass'n of Trial Lawyers Br. 29) mistakenly rely on a public comment that the Secretary summarized in the description of comments in the preamble. 49 Fed. Reg. at 28,972. An agency does not endorse a comment merely by describing it.

[23] Not all tort claims involving airbags would be preempted. A claim that a manufacturer installed an airbag that deployed improperly would not be preempted because it would not frustrate the purposes of Standard 208. Even a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car because of other design features particular to that car (see Nat'l Conf. of State Leg. Br. 12) would not necessarily frustrate Standard 208's purposes.

& Loan Ass'n v. De la Cuesta, 458 U.S. 141, 154-155 (1982); *Kalo Brick & Tile Co.*, 450 U.S. at 326.

The Secretary's view is entitled to substantial weight. "Because the [Department of Transportation] is the federal agency to which Congress has delegated its authority to implement the [Safety] Act, the [Secretary] is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" *Medtronic*, 518 U.S. at 496; *id.* at 506 (Breyer, J., concurring) (administering agency has "special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives").[24]

[24] Petitioners and their amici contend (Pet. Br. 40-41, 49-50; Nat'l Conf. of State Leg. Br. 24-25; Leflar Br. 21-22) that there can be no implied conflict preemption here because, when the Secretary adopted Standard 208, she neither plainly stated her intent to preempt tort liability nor provided notice and comment on the question. That contention rests on a misunderstanding of the basis for conflict preemption. Unlike field preemption, which arises when agencies intend for their regulations to be exclusive." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718 (1985), conflict preemption arises not from a specific intent to preempt but from the direct operation of the Supremacy Clause, which mandates that state law yield to federal law when they conflict. See p. 17, *supra*. Here, because conflict preemption is at issue, neither a statement of preemptive intent nor notice and comment on preemption was required. For the same reasons, the argument that the Secretary lacks authority to give any particular federal standard preemptive force (Nat'l Conf. of State Leg. Br. 24) is wide of the mark. We do not contend that petitioners' claims in this case are preempted because the Secretary decided that Standard 208 should preempt common law liability. We contend that the claims are preempted because they conflict with, and would frustrate implementation of, the policy judgment embodied in the Standard that a choice of passive restraints would best promote safety.

b. Petitioners mistakenly contend (Br. 16, 47-48) that their claims do not conflict with the Secretary's goal of allowing consumers to adjust to new airbag technology because tort liability would not lead manufacturers to change their conduct. To the contrary, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct." *Garmon*, 359 U.S. at 247. Indeed, petitioners' amici acknowledge that tort law "has a deterrence function." Nat'l Conf. of State Leg. Br. 14; see Ass'n of Trial Lawyers Br. 10-12; Leflar Br. 12-13, 17; Missouri Br. 6, 13.[25]

Petitioners also argue (Br. 16, 47-48) that, if manufacturers had changed their conduct and installed airbags, they would have promoted public acceptance of those devices. That may be true, but the Secretary reasonably determined at that time that experience with a variety of passive restraints would best promote public acceptance. In any event, speculation of the sort advanced by petitioners cannot displace the Secretary's reasonable conclusion that claims such as petitioners' would thwart the purposes behind Standard 208.[26]

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[25] That tort law also has other purposes (such as compensation) does not mean tort rules cannot conflict with federal law (Nat'l Conf. of State Leg. Br. 14-15; Leflar Br. 17-19). Conflict preemption flows from the effects of the state law, not its purposes. See *Gade v. National Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 105-106 (1992).

[26] Petitioners suggest (Br. 16, 44) that a tort rule requiring airbags is consistent with Standard 208 because the Secretary determined that airbags were technologically the most effective passive restraint and provided an incentive to encourage manufacturers to install them (see note 5, *supra*). That contention overlooks the Secretary's conclusion that airbags would *not* be effective *in practice* if they were installed in all cars because of the likely public reaction and potential safety dangers in small cars. It also overlooks the Secretary's determination that further research

(Footnote 26 continued on next page)

Petitioners further err in contending (Br. 48-49) that their claims do not conflict with the goal of encouraging innovation and development of more effective restraint systems. Contrary to petitioners' suggestion, the question is not whether tort liability in general stifles innovation but whether liability for failure to install airbags would have done so. The Secretary determined that it would, because of the potential for large damage awards and the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," S. Rep. No. 1301, *supra,* at 12. This Court should decline petitioners' invitation to second-guess that reasonable determination.

Finally, petitioners argue (Br. 44-45) that their claims do not conflict with Standard 208 because their car was manufactured during the phase-in period (when Standard 208 required the installation of some type of passive restraint system in some, but not all, cars) and their car did not have any passive restraint. Those facts do not, however, alter the preemption analysis, because petitioners do not claim that their car was defectively designed because it lacked *any* type of passive restraint. Rather, they claim that the car was defectively designed because it lacked one particular type of passive restraint — an airbag. See Pet. i; Pet. Br. i. Thus, petitioners cannot prevail without a ruling that a car manufactured in 1987 was defectively designed unless it had an airbag. For the reasons we have described, that ruling would conflict with the Secretary's determination that no par-

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(Footnote 26 continued)

and development could lead to more cost-affective restraints. And it overlooks the Secretary's reason for providing the incentive to install airbags — to ensure a variety of passive restraints, not to maximize the number of cars with airbags.

ticular type of passive restraint should be required in any car because the use of a variety of passive restraints would best promote safety.[27]

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[27] This Court therefore need not decide whether Standard 208 would preempt a claim that a car manufactured during the phase-in is defective if it lacks any passive restraint. The Secretary believes that it would preempt such a claim, because the claim would frustrate the safety purposes for which the Secretary adopted the phase-in. See note. 6, *supra*. A tort rule that effectively required passive restraints in all cars during the phase-in would likely have resulted in the nearly exclusive use of automatic seatbelts rather than airbags and impeded the development of data about the benefits of passive restraints that could help prevent a public backlash against them. See 49 Fed. Reg. at 28,999-29,000. Contrary to petitioners' contention (Br. 45), the fact that the claim involved a car manufactured in 1987 or a crash that occurred after the phase-in would not save the claim from preemption. The relevant question is not what manufacturers would do after the jury verdict in question but what they would have done when the relevant version of Standard 208 was promulgated if they had anticipated that they could later be held liable.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 00-955

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

FREDERICK A. HURLEY AND CHRISTINE A. HURLEY,
Petitioners,

v.

MOTOR COACH INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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9 pp

QUESTION PRESENTED

Whether this Court, having decided the pre-emptive effect of Federal Motor Vehicle Safety Standard 208 last Term in the "no-airbag" case — *Geier v. American Honda Motor Co.*, 120 S.Ct. 1913 (2000) — should grant certiorari to review this case, which presents a very similar fact pattern and advances virtually the same legal theory that was rejected in *Geier*.

Rule 29.6 Statment

Respondent Motor Coach Industries, Inc.'s ultimate corporate parent is Motor Coach Industries International Holdings (U.S.A.), Inc., a privately-held corporation, and no publicly-held corporation owns 10% or more of respondent's stock.

JURISDICTION

This Court's jurisdiction is far from clear. Petitioners' Petition for Rehearing and Rehearing En Banc was denied by the Court of Appeals on August 31, 2000. Within 90 days of that date, petitioners submitted to the Clerk of this Court a Petition for Writ of Certiorari that did not conform to the requirements of Rule 9 of this Court because, among other things, the attorney listed as "Counsel of Record" was not admitted to practice before this Court. Moreover, the name of additional counsel was listed on the petition without that attorney's knowledge or permission.

Apparently petitioners' counsel was thereafter admitted to the bar of this Court, and the petition was then placed on the docket on December 12, 2000, more than 90 days after the denial of rehearing. Later, on December 29, 2000, counsel for respondent was served with another version of the petition, which deleted the name of objecting counsel and made a number of typographical corrections and minor changes in terminology, syntax, format, spelling, pagination, and capitalization.

REASONS FOR DENYING THE PETITION

Although the Question Presented by petitioners is largely unintelligible, and violates Supreme Court Rule 14.1(a), this case is essentially a re-run of *Geier v. American Honda Motor Co.*, 120 S.Ct. 1913 (2000). This case, like *Geier*, involves Federal Motor Vehicle Safety Standard 208 and, like *Geier*, raises the question whether a common-law tort action is pre-empted by that standard. The Court dealt decisively with that very issue in *Geier* and ruled that a state-law tort action claiming that an automobile manufacturer was negligent for not equipping its car with an airbag was impliedly pre-empted by FMVSS 208. The Court found an actual conflict because the plaintiff's insistence on an airbag would present an obstacle to the variety and mix of devices that the Department of Transportation sought to make available to the manufacturer and would subvert the gradual phase-in that the federal regulation deliberately imposed. *Id.* at 1922-28.

The only distinctions in this case are (a) that it involves a bus, rather than a car — a distinction that petitioner does not claim makes a difference, as FMVSS 208 applies to all vehicles; and (b) that petitioners' lawsuit alleges that the manufacturer should have included not only airbags but even more restraints to guarantee the driver's safety. *Geier* is therefore *a fortiori*, because if requiring airbags would interfere with the flexibility intended by DOT, the more comprehensive restraints and contrivances petitioners would mandate (including airbags) are even more disruptive of the federal regulatory scheme. Hence, the ground so freshly plowed in *Geier* need not be re-tilled.

Petitioners say in their Question Presented that the opinion below conflicts with *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), and *Geier*, but nowhere else in the petition do they attempt to explain any such "conflict." Indeed, their overriding complaint is that the Seventh Circuit aligned itself with the rationale of those cases — a rationale petitioners don't like. And they appear to claim that the Court was led astray in *Freightliner* and *Geier* by the government's *amicus* filings in those cases (Pet. 12-13). Nothing in that confusing discussion suggests any inconsistency between this case and those.

Petitioners erroneously state that the decision below creates a conflict with three other circuits and an intermediate appellate court in Indiana (Pet. 13, 19-24). The first of those cases, *Perry v. Mercedes-Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992), did in fact hold that FMVSS 208 did not pre-empt a state-law airbag claim. As such, of course, it was squarely contrary to *Geier* and was thus overruled by that decision.

Choate v. Champion House Builders Co., 222 F.3d 788 (10th Cir. 2000), involved a house fire and dealt with the contention that a claim based on the failure to have a battery-powered backup smoke detector or warning device in a manufactured home was pre-empted by the National Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. § 5401-26. The court, after an extensive analysis of *Geier*, held that no implied pre-emption existed. Because the purpose and the history of that particular federal standard differed from that considered in *Geier*, the Tenth Circuit determined that permitting the lawsuit to go forward would be consistent with the stated purpose of the controlling Act and with its legislative history.

The third supposedly conflicting case, *King v. Ford Motor Co.*, 209 F.3d 886 (6th Cir), *cert. denied*, 61 U.S.L.W. 3295 (2000), ruled that a claim challenging Ford's selection of one of three approved passive restraint options under FMVSS 208 was not pre-empted. But instead of disputing the design in the same fashion as in *Geier* or here, the plaintiff in *King* asserted that the specific approved design was defective as implemented by Ford due to the failure to use load limiters and/or change the location of the knee bolster, and/or change the location of the belt anchor. 209 F.3d at 892.

The Indiana case, *Rogers v. Cosco*, 737 N.E.2d 1158 (Ind. App. 2000), addressed a pre-emption claim in light of FMVSS 213, which deals with child booster seats. Petitioners' discussion of *Rogers*, like their treatment of all supposedly "conflicting" opinions, ignores the fact that *Geier* was not based merely on FMVSS 208 as a minimum standard but on the extensive history surrounding DOT's experience with restraints and its expressed desire for flexibility and gradual implementation.

Just as the pre-empted state-law claim in *Geier* "would have presented an obstacle to the variety and mix that the federal regulation sought," the even more cumbersome contraption proposed by petitioners here would tie the hands of manufacturers in a manner disapproved by those charged by federal law with overseeing such matters. This Court in *Geier* spoke authoritatively about the pre-emptive force of FMVSS 208, and, as correctly perceived by the Seventh Circuit, *Geier* squarely forecloses petitioners' claims.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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PETITIONERS' REPLY BRIEF

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QUESTION PRESENTED

Whether the Seventh Circuit has misinterpreted this Court's opinion in the "so-called" "no-airbag" case - *Geier -v- American Honda Co.*, 120 S. Ct. 1913 (2000) and whether this Court should therefore grant Certiorari to correct the opinion of the Court and to resolve conflicts between the various Circuit Courts of Appeals and at least one state court of "last resort".

JURISDICTION

This Court has jurisdiction in accordance with the statement set forth in our Petition. At the time of the filing of the Petition Mr. Howard Paperner was a member of this Court and, in fact, moved for the admission of Thomas C. DeVoto. The Petition was accepted as timely and docketed. Mr. DeVoto was advised by the Clerk's office that "so long as there was at least one attorney of record" who was a member of the Court that the matter would be accepted and docketed. Furthermore, due to the fact that his petition for admission was pending and about to be ruled upon that the Petition would be accepted listing Mr. DeVoto as "Counsel of Record" because under Rule 9.2 Mr. DeVoto could later move to listed as"attorney of record" and that, therefore, no change was necessary.

REPLY ARGUMENT

The vehicle in question is a Bus and that does make all the difference. Sometimes it is difficult to see the forest for the trees. Apparently this is what happened to both Judge Wood and to a lesser extent to Petitioners in their Application for rehearing and in the Petition filed herein.

Two things have brought this oversight to light. First, the Respondent's brief in opposition points out that (sic) petitioners did not distinguish between the **car** in *Geier* and the **Bus** in *Hurley*. Respondent goes on to state that since FMVSS 208 applies to both cars and buses therefore, ipso facto, *Geier* is controlling as to its analysis of "no-airbag" cases.

Secondly, both the Eighth and Ninth Circuit Courts of Appeals have published opinions discussing this Court's ruling in *Geier* and pointed out that the only reason that implied pre- emption barred *Geier's* theory of recovery was the Government's position that it would frustrate the purpose of the statute and the secretary's regulations that called for a gradual "phase-in" of the use of airbags and other passive restraint systems. This "phase-in" was the only "obstacle to the accomplishments and execution of the full purposes and objectives of Congress".[1] (Brief of the United States in *Geier* Appellants Appendix 93-96) Therefore in the absence

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[1] See our Supplemental Brief filed contemporaneously with this Reply.

Harris -v- Great Dane Trailers, Inc. 234 F. 3d 398 (8th Circuit, Dec. 11, 2000)

Leipart, -v- Guardian Industries, Inc., 234 F.3d 1063 (9th Circuit. Dec. 12, 2000)

of the "phase- in" there can be no conflict under *Geier*. Sections 4.4.2.1 and 4.4.2.2 are the subsections of Standard 208 that apply to the bus in question. There is no phase-in or even a requirement to use airbags under the applicable standard. The phase-in under standard 4 applies only to cars - not buses. Standards 4.4.2.1 and 4.4.2.2 allow the manufacture to chose the passive restraints that will allow it to meet the performance standards set forth in sections 5 & 6 of the Standard 208. The evidence in this case is clear that they did not meet those standards, i.e a defective design. Moreover, those standards merely set a minimum or a floor and therefore there can be no pre-emption under the Act and under this Court's ruling in *Geier* as a matter of established law. The Seventh Circuit opinion is simply wrong and this Court should accept the Petition and immediately remand the case for a decision consistent with this Court's opinion in *Geier*.

CONCLUSION

WHEREFORE, for the reasons previously asserted in their Petition and for the reason set forth herein the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February, 2001

(4)

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PETITIONERS' SUPPLEMENTAL BRIEF

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REASONS FOR GRANTING THE WRIT

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Conflicts within the Circuit Courts of Appeals.

Supplemental Table of Authorities

Harris -v- Great Dane Trailers, Inc. 234 F. 3d 398 (8th Circuit, 2000)

Leipart, -v- Guardian Industries, Inc., 234 F.3d 1063 (9th Circuit. 2000)

As predicted in our Petition, two more Circuits have now ruled that when a Federal Safety Standard merely sets a *minimum* (performance standard) that state law claims are not preempted.

ARGUMENT

Both the Eighth and the Ninth Circuits has so ruled in stark contrast to the ruling of the Seventh Circuit which is the subject matter of this petition. The United State Court of Appeals for the Eighth Circuit has concluded that the Motor Vehicle Safety Standards Act and a regulation promulgated thereunder do not preempt a state law cause of action when the regulation merely sets a floor or a minimum performance standard.

In *Harris -v- Great Dane Trailers, Inc.* 234 F. 3d 398 (8th Circuit, 2000) decided December 11, 2000 the Eighth Circuit has interpreted this Court's ruling in *Geier* correctly. The standard at issue in that case was standard FMVSS 108 relating to safety standards for lamps and reflective devices on trailers. The second paragraph of the opinion at the bottom of page 399 acknowledges the ruling of this Court in *Geier* that took place during the pendency of the appeal. In its opinion the Court

acknowledges that Great Dane conceded that express preemption no longer applied but continued to insist that the plaintiff's claim that the trailer lacked reflective tape thus making its rear end visible and conspicuous at night to other motorists was still impliedly preempted. The Eighth Circuit reached its conclusion that plaintiffs' claim was not impliedly preempted strictly based upon its analysis of the Court's opinion in *Geier*. When discussing the effect of *Geier* on its opinion the Court states:

> [*Geier*]"requires careful analysis of whether a particular common law claim would conflict with, or stand as an obstacle to accomplishing the purposes of, a particular Safety Act standard, here, FMVSS 108. Under Arkansas law, the liability of the manufacturer in a products liability action is determined by whether the product was defective "at the time the product was placed on the marker" (Citations omitted).
>
> We further read Geier as strongly suggesting that a minimum federal safety standard will rarely, if ever, impliedly preempt more rigorous common law safety obligations, particularly when, as here, the governing federal statute contains a common law remedial savings clause. Justice Breyer's majority opinion expressly noted that Geier "leav[es]...state tort law to operate...where federal law creates only a floor, *i.e*, a minimum safety standard."120 S.Ct. At 1918. Justice Breyer repeated that theme in another transportation regulatory preemption case the Court decided last term: "common sense and sound policy suggest that federal minimum safety standards should not pre-empt a state tort action claiming that in the particular circumstance a

> railroad's warning device remains inadequate." Norfolk So. Ry. -v- Shanklin, 120 S. Ct. 1467, 14776 (2000) (Breyer concurring (quotation omitted; emphasis in original). Thus if the purpose of FMVSS 108 was merely to provide a minimum federal safety standard to trailer manufacturers, it does not preempt Harris's common law claim that Great Dane is liable in tort for failing to provide greater safety protection than the minimum standard required Id. 400.

This is exactly what Petitioners have been saying. Standard 208, as it relates to buses simply creates only "a floor...a minimum standard". *Geier* by its own terms is limited to automobile cases manufactured during a specific period of years and not intercity buses - ever. Petitioners claim cannot stand "as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed" *Geier* at 1925 because the phase-in *only applied to passenger vehicles* and not to buses!

Preemption in *Geier* is limited to those passenger vehicles to which the phase-in applied. The phase-in does not apply to buses. There is no conflict. The defendant makes no argument that it cannot comply with both the federal minimum standards and the "regulations" imposed by the Illinois Common-Law.

In *Leipart, -v- Guardian Industries, Inc.*, 234 F.3d 1063 (Ninth Circuit. 2000) decided December 12, 2000 the Ninth Circuit reached a similar conclusion involving its interpretation of both the pre-emption and savings clauses of the Consumer Product Safety Act. In *Leipart* plaintiff was severely injured by the glass in shower door manufactured by defendant Guardian.

The Court starts its analysis of this issue acknowledging this Court's opinion in *Geier*:

> We are assisted in our analysis by the Supreme Court's decision last Term in Geier -v- American Honda (citation omitted), rendered after the district court's decision in this case. In Geier, the Court interpreted closely analogous pre-emption and saving clauses of the National Traffic and Motor Vehicle Safety Act (NTMVSA). ..... Section 1392(d) of the NTMVSA pre-empted any state safety "standard" that was not "identical" to the federal "standard, : just as section 2075(a) does. And section 1397(k) of the NTMVSA saved common law actions even when a defendant complied with a federal safety standard" just as section 2074(a) saves common law actions when defendant complies with a federal safety "rule".
>
> The Court in Geier concluded that under the NTMVSA, a state law "standard" was not the same thing as a state common-law tort "requirement." After considering the Act's preemption and saving clauses together, the Court concluded that state requirements imposed under common-law tort actions were not "standards" within the meaning of the NTMVSA, and that such court actions were therefore not pre-empted by the text of that statute:
>
> > [A] reading of the express preemption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving room for state tort law to operate – – for example, where federal law creates only a floor, i.e., a minimum safety standard....The language of the pre-

> emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the preemption clause must be so read. 120 S. Ct. at 1925.

The court's textual analysis in Geier did not, however, complete its inquiry. The Court went on to consider whether a tort-based requirement conflicted with the overall scheme of the federal statute: "nothing in the language of the saving clause suggests an intent to save state-law court actions that conflict with federal regulations." Ibid. at 1919. On the facts of Geier, the Court concluded that a state common-law requirement of airbags conflicted with the policy behind the NTMVSA, which was to have a " variety and mix" of passive restraint systems, and to have a " gradual... phase-in" of passive restraints. Ibid. at 1925.

We conclude from the Court's textual analysis of the NTMVSA in Geier that analogous federal safety standards promulgated under the CPSA do not preempt state common-law requirements. See also Choate vs. Champion Home Builders Co., 222 F.3d 788 (10th Cir. 2000) (reaching the same conclusion in construing analogous provisions of National Manufactured Housing Construction and Safety Standards Act of 1974).[1] But the question remains, as in Geier, whether such common-law requirements conflict with the statute considered as a whole. Conflict preemption occurs " wherein it is impossible for a private party to comply with both state and federal requirements,... or where state

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[1] Previously cited in petitioners application.

> law " stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (Citations omitted)
>
> Guardian makes no argument in this case that it would be "impossible....to comply" both with existing federal safety standards under the CPSA and with existing requirements under California's common law of torts. The question before us is, rather, whether California's common-law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Leipart* at 1069

Without continuing to quote from the court's opinion, suffice it to say that the ninth circuit concluded that no such conflict existed primarily because the standards in the CPSA " created only a floor, i.e. a minimum safety standard above which state common-law or requirements were permitted to impose further duties". ID 1070. This, of course, was after concluding that the California common-law created "regulations" and not "standards" once again citing this court's opinion in *Geier* as its authority for this ruling. The court went on to conclude that "plaintiffs' common-law claims based in strict and negligent based liability for design, manufacture and distribution are not pre-empted by the CPSA". Leipart at 1070.

Applied to the facts of *Hurley* the Seventh Circuit has simply misinterpreted this Court's ruling in *Geier* to the extent that it is limited to passenger motor vehicles subject to the 1984 standard which deliberately sought to gradually phase-in of air-bags and a mix of passive restraint equipment to new **CAR** (emphasis added) fleets between the years 1986 and 1989. *Geier* at 1924

Therefore the Circuit Court of Appeals opinion must be reversed simply for its erroneous interpretation of *Geier* on two grounds:

a. *Geier's* pre-emptive effect is limited to those vehicles subject to the "phase-in"and in the absence of a "phase-in" there is nothing in this Illinois Law tort based "requirement that can possible conflict with the overall scheme of the federal statute and its regulations as promulgated by the Secretary of Transportation, and

b. *Geier* states unequivocally that where a federal standard creates a minimum or only a floor, that state law claims to quote the Eighth Circuit, "*will rarely, if ever, impliedly preempt more rigorous common law safety obligations, particularly when, as here the governing federal statute contains a common law remedial savings clause*". (Emphasis added).

CONCLUSION

Wherefore, for the reasons previously submitted, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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